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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1991

T. HARRIS YOUNG & ASSOCIATES, INC.
Petitioner,

v.

MARQUETTE ELECTRONICS, INC.
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The defendant, a dominant manufacturer of heart monitoring and diagnostic machines ("EKG" and "Stress Testing") and of recording paper used in those machines in the United States, advised its customers that it would or might void its machine warranties and refuse to honor its machine service contracts if customers (major hospitals) used the plaintiff's less expensive "generic" recording paper in these machines. Following a jury verdict for the plaintiff, a judgment n.o.v. for the defendant on a Sherman Act tying claim was affirmed by the court of appeals, holding that no tying arrangement could exist because there had been no *express* withholding or threat to withhold the tying product (machines) unless customers purchased the tied product (recording paper). The court of appeals also held that some (not all) testimony regarding the pendent tortious interference claim had been improperly admitted into evidence, but rather than grant a new trial or remand to the district court, it dismissed outright the jury's verdict for the plaintiff after reweighing what it described as "reams of trial transcripts and evidence."

The questions presented are:

1. Whether, consistent with the position of the United States and the language of the Sherman and Clayton Acts, an unlawful tying arrangement exists when the defendant successfully forces the purchase of a tied product by means of an implied, rather than express, conditioning?

2. Has the Eleventh Circuit so far departed from the accepted and usual standard of appellate review, because it reweighed the evidence and assessed the credibility of witnesses, decided questions of fact as questions of law, and reversed outright the denial of a judgment n.o.v. that the exercise of this Court's power of supervision is necessary?

RULE 29.1 DISCLOSURE

The caption of the case in this Court contains the names of all parties to the appeal in the United States Court of Appeals for the Eleventh Circuit. The petitioner, T. Harris Young & Associates, Inc., has no parent companies, subsidiaries or affiliates. The following is a list of the parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates of the respondent, Marquette Electronics, Inc. This representation is made pursuant to Rule 29.1 of this Court:

Marquette N. Ireland, Ltd.
Marquette Gas Analysis Corp.
Marquette Electronics GB, Ltd.
Marquette Espana S.A.
Marquette Electronics SARL
Marquette Electronics GMBH
Marquette Italia S.A.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.1 DISCLOSURE ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 9

Summary 9

I. The Eleventh Circuit's Decision Conflicts With Prior Decisions of this Court and Other Courts of Appeal Defining the Existence of a Tying Arrangement 10

II. The Eleventh Circuit Has Employed an Improper Standard of Appellate Review In Its Reversal of the Denial of a Judgment n.o.v. and Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings That the Exercise of This Court's Power of Supervision is Necessary 14

CONCLUSION 17

Page

APPENDIX 1a

Special Interrogatory Verdict in the United States District Court 1a

Order and Amended Judgment on the Jury Verdict in the United States District Court 7a

Final Judgment Notwithstanding the Jury Verdict (Antitrust Claims) and Final Judgment on Jury Verdict (Tortious Interference) 12a

Memorandum Opinion of the United States District Court on Final Judgment NOV (Antitrust Claims) and Final Judgment on Jury Verdict (Tortious Interference) 14a

Memorandum Opinion of the United States District Court on Order Amending Final Judgment to Reflect Denial of Marquette's Motions for New Trial and Remittitur 26a

Decision and Opinion of the United States Court of Appeals for the Eleventh Circuit 29a

Supplement to Suggestion of Rehearing En Banc 54a

Decision on Rehearing in the United States Court of Appeals for the Eleventh Circuit 56a

District Court's jury instruction on tying claim 58a

Seventh Amendment to the United States Constitution 63a

Sherman Antitrust Act, Section 1 ..... 63a

Clayton Act, Sections 3 and 4 ..... 63a

Rule 50(b), Federal Rules of Civil Procedure 66a

TABLE OF AUTHORITIES

CASES — Page

Advance Business Systems and Supply Company v. SCM Corporation, 415 F.2d 55 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970) 11, 13

Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33 (1980) 16

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 15

Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985) 15

Buckeye Powder Co. v. E.I. du Pont de Nemours Powder Co., 248 U.S. 55 (1918) 16

Continental Ore Co. v. Union Carbide & Carbon Corp. 370 U.S. 690 (1962) 14, 17

Deas v. Paccar, Inc., 775 F.2d 1498 (11th Cir. 1985), *cert. denied*, 475 U.S. 1129 (1986) 16

Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927) 14

Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969) 13

Heatransfer Corp. v. Volkswagenwerk A.G., 553 F.2d 964 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978) 11, 13

Herman Schwabe, Inc. v. United Shoe Machinery Corp., 297 F.2d 906 (2nd Cir. 1962) 16

Page

Image Technical Service, Inc. v. Eastman Kodak Co.,
903 F.2d 612 (9th Cir. 1990), *cert. granted*,
59 U.S.L.W. 3833 (June 18, 1991).....9, 12

Jefferson Parish Hosp. Dist. No. 2 v. Hyde,
466 U.S. 2 (1984).....11, 14

McDonough Power Equipment, Inc. v. Greenwood,
464 U.S. 548 (1984).....16
Mercoid Corp. v. Mid-Continent Co.,
320 U.S. 661 (1944).....14

Montgomery Ward & Co. v. Duncan,
311 U.S. 243 (1940).....16

Morris Jewelers, Inc. v. General Electric Credit Corp.,
714 F.2d 32 (5th Cir. 1983).....16

Northern Pac. Ry. Co. v. United States,
356 U.S. 1 (1958).....11, 12, 14

Salem v. United States Lines,
370 U.S. 31 (1962).....16

T. Harris Young & Associates, Inc. v. Marquette Electronics, Inc., 931 F.2d 816 (11th Cir. 1991).....1

Times-Picayune Publishing Co. v. United States,
345 U.S. 594 (1953).....13

United States v. Loew's, Inc.,
371 U.S. 38 (1962).....9, 13

United States Steel Corp. v. Fortner Enterprises, Inc.,
429 U.S. 610 (1977).....13

Page

Zenith Radio Corp. v. Hazeltine Research, Inc.,
395 U.S. 100 (1969).....17

CONSTITUTION, STATUTES, AND RULES

U.S. Const. Amend. VII.....2

28 U.S.C. § 1254(1).....2

15 U.S.C. § 1, Sherman Act.....2

15 U.S.C. §§ 14, 15, Clayton Act.....2, 10, 12

Rule 50(b), Federal Rules of Civil Procedure.....2

OTHER AUTHORITIES:

5A, Moore's Federal Practice, 2d Edition, § 50.03(2).....16

Scalia, *The Rule of Law as a Law of Rules*,
56 U. Chi. L. Rev. 1775 (1989).....16

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

T. Harris Young and Associates, Inc. ("Young") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in *T. Harris Young & Associates, Inc. v. Marquette Electronics, Inc.*, Nos. 90-3252, and 90-3364, which held, among other things, that a Sherman Act "tying" arrangement cannot exist unless the defendant expressly rather than impliedly, conditions the sale of a tying product upon the purchase of a tied product.

OPINIONS BELOW

The opinion of the Eleventh Circuit is reported at 931 F.2d 816 (11th Cir. 1991) (29a).[1] The judgment and memorandum opinions of the United States District Court for the Middle District of Florida, (Merhige, Visiting Judge) were not printed in an official reporter, but are in the Appendix (12, 14, 26a).

[1]The reference ("____"a) is to the Appendix to this petition.

STATEMENT OF JURISDICTION

This is a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit rendered on May 20, 1991, (rehearing denied August 30, 1991). Jurisdiction lies pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution; Section 1 of the Sherman Act (15 U.S.C. § 1); Sections 3 and 4 of the Clayton Act (15 U.S.C. §§ 14, 15), and Rule 50(b), Federal Rules of Civil Procedure (JNOV), the texts of which are in the Appendix (63-66a).

STATEMENT OF THE CASE

Young is a wholesale distributor of recording paper and supplies used in the operation of electrocardiographic machines and electronic medical equipment for diagnoses and monitoring of cardiac patients (31a). Marquette Electronics, Inc. ("Marquette") manufactures and sells electronic medical systems which use recording paper and supplies such as those which Young sells. Marquette also sells recording paper bearing its name in competition with Young. (30-31a).

Young's market survey, conducted by U.S. Testing Company Market Research, Inc., demonstrated that Marquette occupies a dominant position in both the markets for EKG and stress testing equipment, and for recording paper used in the equipment (PX. 125, pp. 13, 14, 18, 23, 29 and 35). Moreover, Marquette describes itself as a "world leader" in electrocardiography (PX. 5, 108 and R. 18 at 52); and its tradename and trademark are registered and protected.[2]

[2]Marquette counterclaimed for violation of the Lanham Act and for Young's unfair competition by infringement of common law rights. (R.14-10-16).

Approximately 80% of this recording paper has been purchased by large hospitals (those in excess of 200 beds) where both Young and Marquette have sold (34a), and there was evidence that the dollar value of this recording paper market in the southeastern United States was approximately $4.460 million in 1988, and was projected to exceed $10 million by 1997 (PX. 154). Such larger hospitals are also primary purchasers of EKG and monitoring equipment for the sale of which Marquette has a dominant position. 47% of these hospitals use Marquette EKG equipment as their primary brand, and 41% use Marquette stress testing equipment as their primary equipment which is a 10% and 15% greater incidence of use respectively than its nearest competitor. Furthermore, 63% of the large hospitals surveyed use some form of Marquette equipment which is 20% more incidence of use than its nearest competitor (PX. 125, pp. 13, 14, 28, and 23).

Young sued Marquette in the United States District Court for the Middle District of Florida seeking damages for antitrust claims (tying arrangement and attempted monopoly), and for tortious interference with business relating to Young's sale of generic recording paper suitable for use in Marquette electronic medical equipment among others (34a).

The jury returned a special interrogatory verdict finding in favor of Young on each element of its antitrust and tortious interference with business claims, and awarding it substantial monetary damages.[3] In particular, the jury answered "yes" to these questions concerning the tying claim (3a):

> Do you find that Marquette tied the purchase of its electrocardiographic recording paper to the sales and

[3]$1.8 million to Young for Marquette's attempted monopoly; $1.4 million on the tie-in claim; and $1.25 million compensatory damages and $1.8 million punitive damages for Marquette's tortious interference with Young's business (1a).

> service of its medical equipment and thus forced the purchase of its paper?
>
> Do you find that Marquette had sufficient power in the relevant equipment market to raise prices or impose burdensome terms to a significant number of buyers within the market?

The district court granted a judgment n.o.v. in favor of Marquette on the antitrust claims, and denied Marquette's motion for judgment n.o.v. for tortious interference, holding that "there was ample evidence from which the jury could have concluded that Defendant tortiously interfered with Plaintiff's business. . . ." (24-25a). The district court denied Marquette's motion for a new trial on all claims (26-28a). The Eleventh Circuit affirmed the judgment n.o.v. on the antitrust claims and reversed the denial of the judgment n.o.v. on the tortious interference claim (30a).

The jury was given a *per se* charge regarding the claimed unlawful tying arrangement[4], and did find by special interroga-

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[4]The district court determined that this was a case for a *per se* tying arrangement, and that ruling was not an issue on appeal. The court's complete jury instruction regarding "tying" is in the Appendix at 58-62a, it charged the jury in part:

> The conduct, specific conduct which Young claimed violated this section of the Act is Marquette's alleged tie of the purchase of its electrocardiographic recording papers to the sale and service of its medical equipment in a way that coerced the users of its equipment to become consumers of its electrocardiographic recording papers. A tying arrangement is defined as use by a party of its power in the market for one product, which is known as the tie in product to coerce buyers or to force buyers, in effect, to purchase a different product known as the tied product. ***It is not necessary that the tie-in be imposed by means of an express contractual provision.*** Such arrangements are inherently anticompetitive and are per se unlawful under section one of the Sherman Act because the

seller with market dominance in one product is able to force the purchase of another product in a different market, thereby foreclosing competition in that market as to the second or tied product. In order to establish the existence of such an illegal tying arrangement, the burden is upon Young to prove each of the following elements by a preponderance of the evidence:

First, a tying and a tied product.

Second, evidence of actual coercion by Marquette that in fact forced buyers to purchase the tied product.

Third, Young must prove that Marquette had sufficient economic power or significant market leverage in the tying product market to appreciably restrain or foreclose free competition in the market for the tied product.

Fourth, that there were anti-competitive effects in the tied product market as a result of Marquette's actions.

Five, that the alleged tying arrangement involved a not insubstantial amount of commerce. In deciding this latter question, you must look to the total dollar volume of sales in interstate commerce by Marquette of the products, if any, which you find to have been tied to the alleged tying product. And the court charges you that annual sales in excess of 150 thousand dollars a year are not insubstantial.

Lastly, Young must prove that it suffered injury or damage to its business or property as a proximate result of Marquette's violation of the antitrust laws in forcing the alleged illegal tying arrangement. The injury must be appreciable, that is, sufficient to be recognized as having occurred, and, such injury or damage must have been a proximate result and direct and natural consequence of the illegal tying arrangement.

The key to a tying arrangement's illegality and anticompetitiveness is the seller's ability to force buyers to purchase the tied product, not because the seller has a better product or lower price, but because of the seller's dominance or control over the market for the tying product. . . .

* * *

In order to find coercion you must conclude that the defendant, Marquette, *has forced buyers to buy both products, and any appearance of choice was merely a sham.*

You are further charged in order for a tying arrangement

tory verdict that Marquette tied the purchase of its electrocardiographic recording paper to the sales and service of its medical equipment and forced the purchase of its paper (3a).

The jury instruction on the claimed tying arrangement was not an issue raised by Marquette on appeal.

The district court was of the opinion that there was sufficient evidence for a reasonable jury to conclude that Marquette coerced its customers into buying Marquette paper:

> Marquette's warranty excludes repairs that are required as the result of the use of supplies not recommended by Marquette . . . An illegal tying arrangement 'may be inferred from an extrinsic course of conduct supplementing the written contract.' . . . The Fourth Circuit Court of Appeals found such a course of conduct where a lessor of copying machines supplemented a rental agreement provision prohibiting the use of supplies which may cause damage or deterioration' with persistent and deliberate misrepresentations, sabotage and threats of cancellation.' . . . Evidence of similar conduct was brought before the jury in the instant case. That is several witnesses testified that customers had, by Marquette's conduct, been made to believe that use of non-Marquette paper would damage their machines and void their equipment warranty . . . The Court is of the opinion that there was sufficient evidence at trial for a reasoanble jury to conclude

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to be illegal the defendant must possess sufficient economic power with respect to the tying product to restrain free competition appreciably in the market for the tied product by raising its prices without losing an appreciable amount of its business, or to impose burdensome terms, such as a tie-in that could not be exacted in a competitive market (emphasis supplied).

> that Marquette coerced its customers into buying Marquette paper (22-23a).

The Eleventh Circuit, however, held that the tying claim failed because Young did not present evidence that Marquette expressly withheld or threatened to withhold the tying product (equipment) unless the buyer purchased the tied product (recording paper) (37a).[5] In the Eleventh Circuit's opinion "Where there is no Tie, There is no Claim" (36a), and it expressed the simple formula that:

> . . . for a tie to exist a seller ***must withhold*** product A unless the buyer also selects product B. (37a) (emphasis added).

On Young's tortious interference with business claim, the jury expressly found that Marquette used misrepresentations or illegal conduct to induce existing or potential customers of Young not to purchase from it; that Marquette's actions were done intentionally to injure or destroy Young's business; and that Young suffered injury to its business as a direct and natural consequence of Marquette's conduct (4a).

The district court held that there was sufficient evidence to support the jury's conclusions as to both compensatory and punitive damages, i.e.:

> . . . there was ample evidence from which the jury could have concluded that Defendant tortiously in-

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[5]The court of appeals says that Young "does not even allege that Marquette withheld or threatened to withhold" equipment unless its customers selected Marquette recording paper (39a). Aside from the district court's conclusion regarding the evidence, Young's pleading was:

> As the direct result of Marquette's false claims . . . its threats to avoid its equipment warranties, Marquette has enforced tie-in sales for its brand of recording papers. . . . (R. 1-19-20).

> terfered with Plaintiff's business, and that the interference was intentional and had the destruction of Plaintiff's business as its purpose. For example, the jury heard testimony that Marquette repeatedly misrepresented the consequences of using non-Marquette paper in Marquette's machines, that current pricing information was withheld from Plaintiff, and that Plaintiff's name was deleted from Defendant's supplies ordering brochure despite assurances that Plaintiff would continue as a Marquette distributor. Given such evidence, it was not unreasonable for the jury to conclude that the decline in Plaintiff's sales was due to Defendant's tortious conduct. (24-25a).

The Eleventh Circuit concluded that the district court had erroneously admitted some evidence, and on that basis reversed the denial of the judgment n.o.v. for tortious interference (51a), directing dismissal of the complaint rather than ordering a new trial or remanding the case for further consideration by the district court. Young argued that there was sufficient lawful evidence to support the verdict, and a decision that there was judicial error in the ***admission*** of evidence would not be grounds for it to have ordered a judgment n.o.v. (55a). Nevertheless, the Eleventh Circuit substituted its assessment of the evidence for the jury's findings on disputed questions of fact in a seven-day jury trial which the court of appeals says "produced reams of trial transcripts and evidence." (45, 47-51 and n. 24 at 51-53a).

REASONS FOR GRANTING THE WRIT

SUMMARY

The Eleventh Circuit's decision requires proof of a direct withholding of the tying product as the first element of all tying claims, and precludes evidence of actual coercion by the seller (other than by express withholding or threat to withhold) that forces the buyer to buy the tied product thereby conflicting with the law that forcing may take many forms which would satisfy the *condition* element of an unlawful tying arrangement.

The United States has never contended nor has this Court held that proof of unlawful tying arrangements is limited to proof of express conditioning intrinsic to the sale transaction. For example the government's position and the Court's holding in *United States v. Loew's, Incorporated*, 371 U.S. 38, 54 (1962) that "surreptitious" violations arising from "subtler forms of sales pressure" might result in the block booking contracts sought to be avoided. Also, in *Image Technical Service, Inc. v. Eastman Kodak Co.*, 903 F.2d 612 (9th Cir. 1990), *cert. granted*, 59 U.S.L.W. 3833 (June 18, 1991) (to review Kodak's refusal to sell replacement parts to owners of its products who use independent service organizations), although the government has submitted an amicus curiae brief in support of Kodak it has declined to address Kodak's argument that no tying arrangement existed without an express conditioning of the purchase of the tied product.

The instant case is an appropriate vehicle, alongside *Kodak* to examine that fundamental issue which is central to all tying cases, and concerning which the Eleventh Circuit is in direct conflict with other courts of appeal and with this Court.[6]

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[6]Young respectfully requests that the Court invite the Solicitor General to file a brief expressing the views of the United States with respect to question one presented by this petition.

Furthermore, the Eleventh Circuit has departed from the correct standard of appellate review of the grant or denial or a judgment n.o.v., because it substituted its assessment of the evidence for the jury's findings on disputed questions of fact and made legal rulings regarding witness credibility, and it ordered a judgment n.o.v. based on alleged errors in the admission of evidence.

I. The Eleventh Circuit's Decision Conflicts With Prior Decisions of this Court and of Other Courts of Appeal Defining the Existence of a Tying Arrangement.

A "tying" arrangement exists when a manufacturer, using economic leverage in a tying product, forces customers to purchase a tied product, even when there is no express conditioning of such purchases. Section 3 of the Clayton Act, defining unlawful tying provides in part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale or contract for sale of such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

The Eleventh Circuit's decision requiring proof of an express withholding of the tying product or threat to withhold states an overly narrow definition of the *condition* element of an

unlawful tying arrangement in violation of Section 1 of the Sherman Act because it precludes extrinsic evidence of other forms of actual coercion by the seller that, in fact, forced the buyer to buy the tied product. The result immunizes various forms of coercive conduct (other than an express withholding) which force a buyer to buy tied product that it either did not want at all or might have preferred to purchase elsewhere on different terms.

Consequently, this decision effectively allows a dominant manufacturer to engage in subtle forms of coercion and surreptitious violation of the prohibition of tying arrangements, and in so doing it conflicts with decisions of this Court and the other courts of appeal. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S.2 at 12-18 (1984) (citing cases and holding that when "forcing" occurs the tying arrangement is unlawful and forcing may take many forms thereby satisfying the condition element of an unlawful tying arrangement); *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5-6 (1958) (An "agreement" not to purchase the tied product from any other supplier is part of the definition of a tying arrangement); *Loew's, Inc.* (Injunction against tying violations broadened to include prohibition of surreptitious conduct and subtler forms of sales pressure which would result in illegal tying); *Advance Business Systems and Supply Co. v. SCM Corporation*, 415 F.2d 55 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970) (An illegal tying arrangement was shown to exist where *SCM*, through misrepresentations, threats to cancel service contracts, and sabotage, effectively coerced lessees to use only *SCM* supplies in their rental machines); *Heatransfer Corp. v. Volkswagenwerk A.G.*, 553 F.2d 964 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978) (The condition element of an illegal tying claim may be shown by an extrinsic course of coercive conduct).

A writ of certiorari has issued for review of *Image Technical*

Service, Inc. v. Eastman Kodak Co. to review Kodak's refusal to sell replacement parts to owners of its products who used independent service organizations. That case, in which a summary judgment in favor of Kodak was reversed, involves questions of *per se* unlawful tying arrangement with respect to repair services, whether parts and service constitute separate product markets, market power, and of a relevant product market to support a monopolization claim. Kodak defended saying, among other things, it does not force owners to buy service in order to receive parts, but only requires customers not to use outside service organizations. Similarly the Eleventh Circuit has held that Marquette is correct in its contention that it does not require its equipment customers to buy Marquette paper in order to buy its equipment. The Ninth Circuit held that Kodak "misconceives the nature of tying arrangements," and explained that an agreement not to purchase the tied product from any other supplier was part of the definition of a tying arrangement citing *Northern Pac. Ry. Co.* 356 U.S. 1 at 5-6. *Image Technical Service,* 903 F.2d at 616.

As mentioned above, the government has submitted an *amicus curiae* brief in support of Kodak but it has declined to address Kodak's argument that no tying arrangement existed without an express conditioning of the purchase of the tied product.

A rule allowing tying arrangements resulting from "subtler forms of sales pressure", indirect, or implied conditioning, narrows Section 1 of the Sherman Act to an extent which would make its evasion and avoidance a simple task. A rule permitting indirect or implied conditioning also contradicts the language of Section 3 of the Clayton Act which prohibits the conditioning of a sale upon the purchaser's agreement not to use the goods, supplies, or other commodities, etc. of a competitor (63a).

In this case there was substantial evidence as found by the jury and district court that Marquette pursued a course of conduct predicated upon its dominance of the equipment market, which coerced customers into the agreement not to purchase recording paper from suppliers other than Marquette. Although the court of appeals plainly reweighed the evidence (51-53a) it is clear from its decision (n. 24) and from the memorandum opinion of the district court (22-23a) that Marquette engaged in the kind of subtle (and not so subtle) forms of coercion through its surreptitious and direct conduct as that against which the United States obtained injunctive relief in *Loew's*, 371 U.S. 38 at 54-56.

The district court's memorandum opinion concluding that "there was sufficient evidence at trial for a reasonable jury to conclude that Marquette coerced its customers into buying Marquette paper" (22-23a), followed *Heatransfer Corp.* which followed *Advance Business Systems and Supply Company*, 415 F. 2d 55, 64 holding that:

> The presence of an illegal condition may be inferred from an extrinsic course of conduct supplementing the written contract.

The Eleventh Circuit's requirement of proof of an express withholding or threat to withhold intrinsic to the sale transaction as being essential to the *condition* element of an unlawful tying arrangement also conflicts in principle with decisions of this Court holding that proof of a seller's economic power, and proof of the tying nature of a sale arrangement may be inferred, and need not be proven by direct evidence. Compare *Loew's, Inc.* (proof of economic power inferred from film copyrights); *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 504 (1969) (Fortner I) (proof of economic power may be implied from a uniquely advantageous product); *United States Steel Corp. v. Fortner Enterprises*, 429 U.S. 610, 620 (1977) (Fortner II) (uniqueness test); *Times-Picayune*

Publishing Co. v. United States, 345 U.S. 594, 611-613 (1953) (proof of economic power inferred from high market share); *Northern Pacific Ry. Co.*, (control over land related into unique bargaining power); *Mercoid Corp. v. Mid-Continent Co.*, 320 U.S. 661 (1944) (functionally linked products making one useless without the other), and a number of cases cited in *Jefferson Parish Hosp. Dist. No. 2*, 466 U.S.2 at footnote 30 which explains that it is "the character of the demand for the two items" that answers the question of whether or not one or two items" are involved (deductive reasoning to infer the prerequisite of a tying and tied product).

Resolution of question one presented herein is necessary to resolve the conflict and clarify the fundamental ambiguity regarding the law of "tying" created by the decision below.

II. The Eleventh Circuit Has Employed an Improper Standard of Appellate Review In Its Reversal of the Judgment n.o.v. And Has So Far Departed From the Accepted and Usual Course of Judicial Proceedings That the Exercise of This Court's Power of Supervision is Necessary.

The Eleventh Circuit's decision misconstrues the respective roles of the jury, district court, and appellate court. This decision does not follow the correct standard of appellate review because it assesses witness credibility and reweighs the evidence, does not view the evidence in a light most favorable to Young (the non-moving party), and does not allow the district court to reconsider the case. See *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 375 (1927) (The weight of the evidence is exclusively a question for the jury); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699-702 (1962) (The court of appeals is bound to view the evidence in the light most favorable to the non-

moving party); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 604 (1985) (The court of appeals is required to view the entire record in a light most favorable to the non-moving party, giving it the benefit of all inferences which the evidence fairly supports); and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the evidence are jury functions.)

It appears that the Eleventh Circuit has overlooked the fact that there was sufficient non-hearsay evidence of Marquette's tortious interference to go to the jury whose function it was to determine the weight to have accorded to that evidence. David Taylor's testimony for example, which the court of appeals weighs and rejects (n. 24, 52-53a), is direct evidence of Marquette's practice of tortious interference. The Eleventh Circuit's discussion of some of the evidence in its lengthy footnote 24 underscores its having improperly weighed the evidence and having resolved conflicts in the evidence in a manner favorable to Marquette. Moreover, the court of appeals omits the fact that Taylor's allegedly contradictory testimony was from his out of court deposition, and it fails to address Taylor's testimony which was, among other things, that a Marquette manager admitted to Taylor that its telemarketers were instructed to say to its customers:

> . . . if you used other paper than Marquette's paper, that your service contract was not good and also your warranty on your machine (R. 27-399 line 2 through 400 line 11).

The conflict between Taylor's trial and deposition testimony was for the jury to resolve as in the case of any other witness. Questions of witness credibility and of the weight to be accorded to evidence are not susceptible to a single "right" answer, and are for the jury to decide. The salutary jury trial process is itself a rule of deference to the fact finder which

enhances equality of treatment, predictability, and judicial freedom.[7]

A judgment n.o.v. can be based only on the legal insufficiency of the evidence to support a jury verdict. The court of appeals' decision that hearsay[8] evidence was improperly admitted could only support a remand for a new trial, or for reconsideration by the district court, not a judgment n.o.v. 5A, Moore's Federal Practice, 2d Edition, § 50.03(2); *Deas v. Paccar, Inc.*, 775 F.2d 1498 (11th Cir. 1985), *cert. denied*, 475 U.S. 1129 (1986); *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243 (1940) (The motion for new trial involves the

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[7]Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1181-82 (1989)

[8]The alleged inadmissible hearsay was offered to show the state of mind of Young's actual and prospective customers and its resulting damages. Such evidence was admissible for that purpose. Marquette never requested a limiting jury instruction concerning this evidence. *Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 297 F.2d 906, 914 (2nd Cir. 1962); *Morris Jewelers, Inc. v. General Electric Credit Corp.*, 714 F.2d 32, 34 (5th Cir. 1983) (Following *Buckeye Powder Co. v. E.I. duPont de Nemours Powder Co.*, 248 U.S. 55, 65 (1918) holding that an appellate court "should be slow to overturn a judgment on the ground of either the exclusion or the admission of" statements by third persons of their reasons for ceasing to do business "except in a very strong case"). Young did not rely for proof of Marquette's interference and coercion on the reasons customers gave to its telemarketer for their refusal to do business. Proof of interference and of coercion was by the David Taylor testimony, Brinkley testimony which the court of appeals does not cite in full, and the evidence mentioned in the district court's opinion. Thus, the district court did not clearly abuse its discretion by admitting such evidence and denying Marquette's motion for a new trial on this ground. *Salem v. United States Lines*, 370 U.S. 31, 35 (1962) (The trial judge has broad discretion in the matter of the admission of evidence and his action is to be sustained unless manifestly erroneous.); *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (The authority to grant a new trial is confided almost entirely to the exercise of discretion by the trial court.); *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556 (1984) (Motions for a new trial are committed to the discretion of the trial judge.).

discretion of the court and may raise questions arising out of alleged substantial errors in the admission of evidence).

The Eleventh Circuit's reversal of the jury's verdict because "THY failed to produce ***admissible*** evidence sufficient to support a rational jury determination" (51a) (emphasis supplied), without having allowed the district court to reconsider the case, constitutes a grave departure from the accepted and usual course of judicial proceedings. See ***Zenith Radio Corp. v. Hazeltine Research***, 395 U.S. 100, 108 (1969); ***Continental Ore v. Union Carbide***, 370 U.S. 690 at 695-697.

CONCLUSION

The petition for a writ of certiorari should be granted. The court may wish to consider this case together with and as a compliment to its pending consideration of *Kodak, supra*. Alternatively, summary reversal and remand for either a new trial or for reconsideration by the trial judge may be appropriate.

Respectfully Submitted.

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APPENDIX

UNITED STATES DISTRICT COURT
MIDDLE DIVISION OF FLORIDA
ORLANDO DIVISION

Case No. 87-767-CIV-ORL-19

FILED
IN OPEN COURT
JUNE 15, 1989
CLERK
U.S. DISTRICT COURT

T. HARRIS YOUNG AND ASSOCIATES, INC.,
a Florida corporation,

Plaintiff,

vs.

MARQUETTE ELECTRONICS, INC.,
a Wisconsin corporation,

Defendant.

SPECIAL VERDICT FORM

We, the jury, make the following findings:

AS TO THE CLAIMS OF T. HARRIS YOUNG & ASSOCIATES, INC. ("YOUNG"), PLAINTIFF, AGAINST MARQUETTE ELECTRONICS, INC. ("MARQUETTE"), DEFENDANT:

Antitrust Claims

1. On the antitrust claims of Young, do you find the relevant market to have been, as Young alleges, the sale of electrocardiographic recording papers to hospitals of 200 or more beds in the area in the southeastern United States consisting of Florida, Louisiana, Mississippi, Georgia, Alabama, North Carolina, South

Carolina, and portions of Virginia and Tennessee?

Yes x No ____

If your answer to question 1 is "yes," proceed to answer questions 2 and 3. If your answer to question 1 is "no," go on to question 4.

Attempted Monopolization

2. On the claim of Young for attempted monopolization:

A. Do you find that Marquette specifically intended to monopolize the relevant market by engaging in predatory, exclusionary, or anticompetitive conduct?

Yes x No ____

B. Do you find that there was a dangerous probability that monopolization would occur in the relevant market as a result of Marquette's conduct?

Yes x No ____

C. Did Young suffer injury to its business as a direct and natural consequence of Marquette's conduct?

Yes x No ____

If your answer to questions 2(A) through 2(C) is "yes," then answer question 2(D) concerning damages; if your answer to any question from 2(A) through 2(C) is "no," proceed to question 3.

D. The amount of damages shown by a preponderance of the evidence to be reasonably sufficient to compensate Young for its injury is:

Total $1.8 million

Tying Arrangement

3. On the claim of Young that Marquette unlawfully restrained trade by enforcing a tying arrangement in the relevant market:

A. Do you find that Marquette tied the purchase of its electrocardiographic recording paper to the sales and service of its medical equipment and thus forced a purchase of its paper?

Yes x No ____

B. Do you find that Marquette had sufficient power in the relevant equipment market to raise prices or impose burdensome terms to a significant number of buyers within the market?

Yes x No ____

C. Do you find that the alleged tying arrangement foreclosed more than a substantial amount of commerce in the relevant market?

Yes x No ____

D. Did Young suffer injury to its business as a direct and natural consequence of Marquette's conduct?

Yes x No ____

If your answer to questions 3(A) through 3(D) is "yes," answer question 3(E) concerning damages; if your answer to any question for 3(A) through 3(D) is "no," proceed to question 4.

E. The amount of damages shown by a preponderance of the evidence to be reasonably sufficient to compensate Young for its injury is:

$1.4 million

Tortious Interference

4. On the claim of Young that Marquette intentionally interfered with Young's customer relationships:

   A. Do you find that Marquette used misrepresentations or illegal conduct to induce existing or potential customers of Young not to purchase from Young?

      Yes x No ____

   B. Do you find that Marquette's actions were done intentionally to injure or destroy Young's business?

      Yes x No ____

   C. Did Young suffer injury to its business as a direct and natural consequence of Marquette's conduct?

      Yes x No ____

If your answer to questions 4(A) through 4(C) is "yes," answer question 4(D) concerning damages, and 4(E) concerning punitive damages; if your answer to any question from 4(A) to 4(C) is "no," proceed to Marquette's claims against Young.

5. The amount of damages shown by a preponderance of the evidence to be reasonably sufficient to compensate Young for its injury is:

   Total $1.25 million

   A. Do you find that Marquette acted in such a way as to be liable for punitive damages to Young?

      Yes x No ____

If "yes," state the amount of punitive damages, if any, which you find should be awarded to Young:

$1.8 million.

Unfair Competition

1. On the claim of Marquette that Young engaged in unfair competition by passing off non-Marquette recording paper as Marquette's paper:

   A. Do you find that Young used any false representation regarding the recording paper it sold?

   Yes ____ No x

   B. Do you find that Young's false representation was likely to confuse purchasers of recording paper as to its source?

   Yes ____ No x

Defamation

2. As to Marquette's claim that Young defamed Marquette by making statements in a September 15, 1987, letter to its customers:

   A. Do you find that any statements in Young's letter were reasonably understood by those who saw it to disparage Marquette?

   Yes ____ No x

   B. Do you find that any statements in Young's letter were false?

   Yes ____ No x

If your answer to questions 2(A) and 2(B) is "yes," answer 2(C) concerning damages; if your answer to any question, 2(A) and 2(B) is "no," please sign and date this form.

C. Do you find that Young acted in such a way as to be liable for punitive damages to Marquette?

Yes ____ No ____

If "yes," state the amount of punitive damages, if any, which you find should be awarded to Marquette:

$_____.

/s/Donna Hartsaw _____ June 15, 1989

FOREPERSON DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No 87-767-CIV-ORL-19

AUG 21 1102AM'89

T. HARRIS YOUNG AND ASSOCIATES, INC.,
a Florida corporation,

Plaintiff,

vs.

MARQUETTE ELECTRONICS, INC.,
a Wisconsin corporation,

Defendant.

ORDER

Deeming it proper to do so, it is ADJUDGED and ORDERED that the Judgment entered on July 24, 1988 in this cause be and the same is here by amended to read as follows:

This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its special verdict dated June 15, 1989, finding in favor of the plaintiff on its antitrust claims of attempted monopolization (Count I) and tying arrangement (Count II) and on its common law claim of tortious interference with business relationships (Count III).

IT IS FURTHER ADJUDGED AND ORDERED that the plaintiff, T. Harris Young & Associates, Inc., recover of the defendant, Marquette Electronics, Inc., alternatively pursuant to its election filed or to be filed with the Clerk of Court:

1. Under Count I, the sum of Five Million Four Hundred Thousand Dollars ($5,400,000.00), with interest thereon at the rate of 8.85% per annum from date of entry of judgment *nunc pro tunc* to June 15, 1989, and its costs of action; or

2. Under Count II, the sum of Four Million Two Hundred Thousand Dollars ($4,200,000.00), with interest thereon at the rate of 8.85% per annum from the date of entry of judgment *nunc pro tunc* to June 15, 1989, and its costs of action; or

3. Under Count III, the sum of One Million Two Hundred Fifty Thousand Dollars ($1,250,000.00) as compensatory damages, and the further sum of One Million Eight Hundred Thousand Dollars ($1,800,000.00) as punitive damages, with interest thereon at the rate of 8.85% per annum from the date of entry of judgment *nunc pro tunc* to June 15, 1989, and its costs of action; it being the Court's intention to preclude a recovery of damages by plaintiff for more than the sum awarded under a single count of the Complaint. Should a judgment on more than a single count become final after exhaustion of any appeal, plaintiff will be required to waive recovery on all but a single count.

On Defendant's counterclaims, it is FURTHER ADJUDGED AND ORDERED that defendant, Marquette Electronics, Inc., take nothing by this action and Judgment on said counterclaim is entered in favor of the plaintiff.

Jurisdiction is retained for later ruling on the award of attorneys' fees and interest as provided by law.

Approved for entry *nunc pro tunc* to June 15, 1989.

Let the Clerk send a copy of this order to all counsel of record.

/s/Robert H. Merhige, Jr.

Date 8-16-89
nunc pro tunc
June 15, 1989

COPIES MAILED
ON 8-21,1989
BY:_____
Deputy Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

JUDGMENT IN A CIVIL CASE

Case No. 87-767-CIV-ORL-19

T. HARRIS YOUNG AND ASSOCIATES, INC.,
Plaintiff,

vs.

MARQUETTE ELECTRONICS, INC.,
Defendant.

NAME OF JUDGE
Robert Merhige Jr.

☒ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

The issues have been tried and the jury has rendered its special verdict dated June 15, 1989 finding in favor of the plaintiff T. HARRIS YOUNG & ASSOCIATES, INC. on its antitrust claims of attempted monopolization (Count I) and tying arrangement (Count II) and on its common law claim of tor-

tious interference with business relationships (Count III).

Plaintiff T. HARRIS YOUNG & ASSOCIATES, INC. recover of the defendant MARQUETTE ELECTRONICS, INC. alternatively pursuant to its election:

1. Under Count I, the sum of Five Million Four Hundred Thousand Dollars ($5,400,000.00) with interest thereon at the rate of 8.85% per annum from date of entry of judgment *nunc pro tunc* to June 15, 1989 and its costs of action; or

2. Under Count II, the sum of Four Million Two Hundred Thousand Dollars ($4,200,000.00) with interest thereon at the rate of 8.85% per annum from the date of entry of judgment *nunc pro tunc* to June 15, 1989, and its costs of action; or

3. Under Count III, the sum of One Million Two Hundred Fifty Thousand Dollars ($1,250,000.00) as compensatory damages, and the further sum of One Million Eight Hundred Thousand Dollars ($1,800,000.00) as punitive damages, with interest thereon at the rate of 8.85% per annum from the date of entry of judgment *nunc pro tunc* to June 15, 1989, and its costs of action;

On Defendant's Counterclaims:

Defendant MARQUETTE ELECTRONICS, INC. take nothing by this action and Judgment on said counterclaim is entered in favor of the plaintiff T. HARRIS YOUNG & ASSOCIATES, INC.

Copies to counsel of record

August 21, 1989	DONALD M. CINNAMOND
Date	Clerk NANCY L. BLAIR
	(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 87-767-CIV-ORL-19

T. HARRIS YOUNG AND ASSOCIATES, INC.,
a Florida corporation,

Plaintiff,

vs.

MARQUETTE ELECTRONICS, INC.,
a Wisconsin corporation,

Defendant.

FINAL JUDGMENT

For reasons stated in the Memorandum this day filed and deeming it proper so to do, it is ADJUDGED AND ORDERED as follows:

This Court's Order of July 20, 1989 be and the same is hereby VACATED. Judgment is herewith entered in favor of the defendant on Counts 1 and 2 notwithstanding the verdict of the jury as to said counts. Accordingly, it is ADJUDGED AND ORDERED that the plaintiff take nothing by virtue of said counts and the defendant stands dismissed as to each.

IT IS FURTHER ADJUDGED AND ORDERED that defendant's motion n.o.v. as to Count 3 be and the same is hereby DENIED, and it is ADJUDGED AND ORDERED that plaintiff T. Harris Young & Associates, Inc. recover of the defendant, Marquette Electronics, Inc., the sum of

$1,250,000.00 in compensatory damages and the further sum of $1,800,000.00 in punitive damages, for a total of $3,050,000.00 on Count 3 of the Complaint, with interest thereon at the rate of 8.85 percent per annum from the date of the entry of the Judgment *nunc pro tunc* to June 16 , 1989 and its taxable costs.

IT IS FURTHER ADJUDGED AND ORDERED that defendant Marquette Electronics, Inc. take nothing on its counterclaims and the plaintiff T. Harris Young & Associates, Inc. stands dismissed as to same.

The defendant is granted a period of fifteen (15) days from March 22, 1990 to respond to plaintiff's motion for counsel fees.

The plaintiff is granted a period of ten (10) days from the filing of defendant's memorandum to respond thereto.

Let the office of the undersigned send a copy of this Order and Memorandum to all counsel of record.

Robert H. Merhige, Jr.

UNITED STATES DISTRICT JUDGE

Date 3-20-90

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 87-767-CIV-ORL-19

T. HARRIS YOUNG AND ASSOCIATES, INC.,
a Florida corporation,

Plaintiff,

vs.

MARQUETTE ELECTRONICS, INC.,
a Wisconsin corporation,

Defendant.

MEMORANDUM

The instant matter is before the Court on Defendant's Motion for Judgment N.O.V. pursuant to Fed. R. Civ. P. 50(b), Motion for New Trial, and Motion for Remittitur pursuant to Fed. R. Civ. P. 59. The matter has been fully briefed and is ripe for disposition. Jurisdiction is based on 28 U.S.C. Sec. 1331, the Sherman Act, 15 U.S.C. Sec. 1 *et seq.*, and the doctrine of pendent jurisdiction.

The underlying action was tried before a jury. The jury found for Plaintiff on two antitrust claims and one tort claim: (1) the attempted monopolization by Marquette of the distribution and sale of electrocardiographic recording paper; (2) an illegal tying arrangement between certain warranty service on Marquette's monitoring equipment and the use of its paper in that equipment causing a restraint of trade; and (3) a state claim of tortious interference with business because of false claims

regarding the unsuitability of substitute recording paper for use in Marquette equipment. The Court, at trial, denied Marquette's motion for directed verdict as to each count. Defendant now moves that the Court rule that Plaintiff's evidence as to each count was insufficient, and that judgment n.o.v. be entered for Defendant or, in the alternative, that the Court grant Defendant's request for a new trial or remittitur.

I. Motion for Judgment N.O.V.

In ruling on a motion for judgment n.o.v., the Court is bound to consider all of the evidence in the light and with all reasonable inferences most favorable to the nonmoving party. The motion may only be granted if the evidence so strongly favors the movant that reasonable jurors could not reach a contrary verdict. *Gregg v. U.S. Indus. Inc.*, 887 F.2d 1462, 1468-69 (11th Cir. 1989); *Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969).

The Court notes initially that Plaintiff asserts that Defendant should be limited in its motion to arguing those grounds stated in its motion for a directed verdict, i.e., that Plaintiff had failed to present sufficient evidence to prove the relevant geographic and product market in its antitrust claims, and failed to present sufficient evidence to prove damages in its claim for tortious interference with business. Technically, a motion for j.n.o.v. is simply a renewal of the motion for a directed verdict. 9 Wright & Miller, *Federal Practice and Procedure* § 2537, at 598 (1971). Thus, Plaintiff is correct in stating that the general rule is that a motion for j.n.o.v. may only assert those grounds stated in the motion for a directed verdict. *Id.* This avoids having the court and counsel learn of a claimed deficiency in the evidence for the first time after the verdict, when nothing can be done to remedy the situation except to order a new trial. *National Indus., Inc. v. Sharon Steel Corp.*,

781 F.2d 1545, 1549 (11th Cir. 1986) (quoting *Quinn v. Southwest Wood Prods., Inc.*, 597 F.2d 1018, 1025 (5th Cir. 1979)). However, because the rule is harsh, motions for a directed verdict should be construed liberally when the record suggests that the opponent had notice of the movant's concerns. *National Industries*, 781 F.2d at 1549.

Plaintiff complains, as well, that Defendant should be barred from challenging Plaintiff's proof of the unlawful tie-in of Defendant's paper and equipment, of attempted monopolization, and of causation in its motion for j.n.o.v. The record shows that Defendant attempted to state these grounds in its motion for a directed verdict but was cut short by the Court. The Court noted, however, that the Defendant was moving on "[t]he monopoly charge, attempt to monopolize and the tie-in claim." Record at 1544-45. Defendant then endeavored to challenge the tortious interference claim, stating that "[t]here has been no damage of tying that claim to any customers lost. All they have is they say they lost sales." Record at 1545. Plaintiff therefore knew, and the Court was aware, that Defendant objected to the sufficiency of the evidence of unlawful tie-in, attempted monopolization, and causation, despite the fact that the Court did not permit Defendant to fully develop those grounds in arguing its motion for a directed verdict. To bar Defendant from arguing those grounds in its motion for j.n.o.v. would be manifestly unfair, and the Court declines to do so. (1969).

A. Unlawful Tie-In Claim

Defendant challenges the jury's finding that Marquette unlawfully tied the purchase of its electrocardiographic recording paper to the sale and service of its medical monitoring equipment. Defendant's primary ground for doing so is its contention that Plaintiff failed to prove the relevant

markets for the paper and equipment. Defendant also contends that Plaintiff failed to produce sufficient evidence warranting a conclusion that the alleged tie was either unlawful per se or unlawful under the rule of reason.

1. Proof of the relevant markets

Recovery under the federal antitrust law requires a showing of harm to competition in general, as well as harm to the plaintiff as a competitor. *L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F.2d 414, 421 (11th Cir. 1984). Such a showing entails a threshold determination of the relevant market, generally defined as "the area of effective competition." *Id.* at 423 (quoting *Brown Shoe v. United States*, 370 U.S. 294, 324 (1962)). This area "is not limited to the parties in a given case, but encompasses the area in which suppliers of the product can effectively compete and purchasers can turn for supplies." *Id.* at 425 n.15. Furthermore, the relevant market is comprised of both a product dimension (i.e., the availability of substitutes and the producers' ability to expand output) and a geographic dimension (i.e., the area in which the product and its substitutes are traded). *Id.* at 423. The relevant product and geographic market is a question of fact, and the jury's findings concerning the market should not be disturbed unless there is no evidence to support them. *See Graphic Prods. Distrib. v. Itek Corp.*, 717 F.2d 1560, 1569 (11th Cir. 1983).

a. The relevant market for equipment

Plaintiff correctly states that it was required to prove only that Defendant had sufficient power in the medical monitoring equipment market to force buyers to accept its electrocardiographic recording paper. *See Construction Aggregate Transp., Inc. v. Florida Rock Indus., Inc.*, 710 F.2d 752, 781 (11th Cir. 1983). Proof of sufficient power in the equipment

market, however, necessarily entails proof of the relevant market for equipment. *Consolidated Gas Co. v. City Gas Co.*, 665 F. Supp. 1493, 1546 (S.D.Fla. 1987) ("An analysis of market power as to the tying product and the effect of the wrongful activity must be made in the context of a relevant economic market."); *see also In re Data General Corp. Antitrust Litig.*, 529 F. Supp. 801, 809 (N.D. Cal. 1981) (definition of relevant market for tying product is necessary to determine whether there are exclusionary effects in market for tied product). A plaintiff's failure to define the relevant market for a tying product has been held to be fatal to a tying claim. *See Consolidated Gas Co.*, 665 F. Supp. at 1546.

b. The relevant market for paper

Using a special verdict form, the jury specifically found that the relevant market for electrocardiographic recording paper consisted of hospitals of 200+ beds in a nine state area comprised of Florida, Louisiana, Mississippi, Georgia, Alabama, North Carolina, South Carolina, and portions of Virginia and Tennessee. Defendant now challenges that finding on the ground that Plaintiff improperly limited the market.

(1) Plaintiff's limitation of the geographic market

Plaintiff defined the geographic market for paper as the aforementioned nine-state area comprising Plaintiff's sales territory as a Marquette distributor. Defendant contends that the evidence adduced at trial was insufficient to support this definition.

Price data and such corroborative factors as transportation costs, delivery limitations and customer convenience and preference must be considered in determining the relevant geographic market. *L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F.2d at 423. The evidence at trial was that prices

within and without the sales territory were virtually the same. Furthermore, all suppliers rely on UPS or a similar common carrier for delivery, hence there can be no delivery limitations. Plaintiff testified, however, that a consumer preference for regional service existed because of the need for emergency deliveries and because the end user pays for transport costs. While admittedly not substantial, this evidence does support Plaintiff's regional definition of the relevant geographic market. Bound as it is to view the evidence in the light most favorable to Plaintiff, this Court concludes that Plaintiff's evidence as to the relevant geographic market for paper was not insufficient as a matter of law.

(2) Plaintiff's limitation of the product market

"The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes." *Brown Shoe v. United States*, 370 U.S. 294, 325 (1962) (citing *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 593-95 (1957)). Certain factors such as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics or uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors may be considered in determining whether such a submarket exists. *Id.*

Plaintiff contends that 200+ bed hospitals constitute such a submarket and were the relevant market in the instant case. In support of its argument, Plaintiff cites the testimony of various witnesses that sales to 200+ bed hospitals accounted for approximately 80% of both Plaintiff's and Defendant's sales. The fact that large hospitals constitute a distinct class

of customers is not enough, however, to justify classifying those hospitals as an economically significant submarket. *Redmond v. Missouri W. State College*, 1988-2 Trade Cas. 68,323 (W.D. Mo. 1988).

Plaintiff relies as well on two cases, *International Boxing Club v. United States*, 358 U.S. 242 (1959), and *Twin City Sportsservice, Inv. v. Charles O. Finley & Co.*, 676 F.2d 1291 (9th Cir. 1982), in support of the contention that a class of customers may constitute a submarket. In the Court's view, neither case supports such a proposition.

In *International Boxing Club*, the Supreme Court upheld the trial court's determination that a separate market existed for the promotion of championship boxing matches as opposed to the promotion of boxing matches in general. Plaintiff argues that championship boxing matches constitute a class of customers for promotional services. Plaintiff, however, overlooks the fact that the *International Boxing Club* court relied on detailed findings regarding the difference in demand for championship and nonchampionship fights. *See* 358 U.S. at 250-51. This difference results in a corresponding difference in the promotional services required for the different types of matches. It appears to the Court that the Supreme Court's holding in *International Boxing Club* was premised on its conclusion that for a variety of reasons, "nonchampionship fights are not 'reasonably interchangeable for the same purpose' as championship contests." *Id.* at 251. In contrast, the product in the instant case is electrocardiographic recording paper, the characteristics and use of which remain constant no matter who the customer is. Because paper sold to smaller hospitals and clinics is completely interchangeable with paper sold to 200+ bed hospitals, *International Boxing Club* is inapposite to the Plaintiff's case.

In *Twin City Sportservice*, 676 F.2d 1291, a baseball team

owner charged that an exclusive concession contract between a concessionaire and a stadium owner violated the antitrust laws. The Ninth Circuit Court of Appeals upheld the trial court's finding that the relevant market was limited to those concession franchises that yielded more than a certain amount of net profits or gross receipts. 676 F.2d at 1298-99. Plaintiff argues that the market was defined according to a class of customers, i.e., major league large arena concession franchises. Once again, this ignores the court's reliance on evidence that there simply was no realistic competition among national concessionaires for franchises yielding less than the stated threshold amounts. *See* 676 F.2d at 1299. No such lack of competition exists among Marquette's competitors for sales of paper to smaller hospitals. Thus, like *International Boxing Club, Twin City Sportservices* is inapposite to the Plaintiff's case.

Plaintiff therefore attempts to improperly limit the product market for paper to a class of customers. This Court concludes that because the product market is an essential component of the relevant market, Plaintiff has failed to prove the relevant market for paper.

2. The legality of the alleged tying arrangement

a. Per se analysis

In order to prove that a tying arrangement is illegal per se, the plaintiff must establish the following four elements: (1) the existence of two separate products, the tying product and the tied product; (2) that the buyer was forced to buy the tied product in order to get the tying product; (3) that the seller was sufficiently powerful in the tying product market to force buyers to accept the tied product; and (4) that there was a substantial amount of interstate commerce in the tied product market. *Tic-X-Press, Inc. v. Omni Promotions Co.*, 815 F.2d

1407, 1414 (11th Cir. 1987). As heretofore discussed, Plaintiff's failure to define the relevant market in equipment defeats any showing of Marquette's power in that market.

Defendant maintains that Plaintiff failed to establish that customers were forced to buy Marquette's paper in order to get Marquette's equipment. The Court disagrees. Marquette's warranty excludes repairs that are required as the result of the use of supplies not recommended by Marquette. The warranty is thus less coercive on its face than the arrangements found to be unlawful in the cases relied on by Plaintiff. *See International Business Machines Corp. v. United States*, 298 U.S. 131 (1936) (unlawful tying arrangement found where IBM wouldn't lease machines unless plaintiff used IBM tabulating cards); *International Salt Co. v. United States*, 332 U.S. 392 (1947) (unlawful tying arrangement found where International Salt refused to lease salt dispensing machines unless lessee purchased all salt to be used in machines from International Salt).

An express contractual provision imposing such a condition is not necessary for an illegal tying arrangement to be shown, however. An illegal tying arrangement "may be inferred from an extrinsic course of conduct supplementing the written contract." *Heatransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964, 977 (5th Cir. 1977) (quoting *Advance Business Sys. and Supply Co. v. SCM Corp.*, 415 F.2d 55, 64 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970)). The Fourth Circuit Court of Appeals found such a course of conduct where a lessor of copying machines supplemented a rental agreement provision prohibiting use of "supplies which may cause damage or deterioration" with "persistent and deliberate misrepresentations, sabotage, and threats of cancellation." *Advance Business Systems*, 415 F.2d at 64. Evidence of similar conduct was brought before the jury in the instant case. That is,

several witnesses testified that customers had, by Marquette's conduct, been made to believe that use of non-Marquette paper would damage their machines and void their equipment warranty. *See, e.g.*, Record a 156-67, 297, 301, 325. The Court is of the opinion that there was therefore sufficient evidence adduced at trial for a reasonable jury to conclude that Marquette coerced its customers into buying Marquette paper. Nevertheless, Plaintiff's proof of a per se illegal tying arrangement fails because of the Plaintiff's failure to prove the relevant market for equipment.

b. Rule of reason analysis

A tying arrangement that does not meet the requirements for per se illegality may nevertheless be found to be illegal under the rule of reason. *Fortner Enter. v. United States Steel*, 394 U.S. 495, 500 (1969). This requires a showing of actual adverse effect on competition. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 29 (1984). Such a showing in turn requires as a threshold the establishment of the relevant market in which the defendant's actions unreasonably restrained trade. *L.A. Draper & Son*, 735 F.2d at 422. Plaintiff's failure to prove the relevant market for paper is thus fatal to any attempt to show that the tying arrangement was illegal under the rule of reason.

B. Attempted Monopolization

Attempted monopolization is "the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it." *American Tobacco Co. v. United States*, 328 U.S. 781, 785 (1946). An attempted monopolization claim has three elements: (1) specific intent to monopolize; (2) overt conduct in furtherance of that intent; and (3) a dangerous probability of suc-

cess. *Quality Foods v. Latin American Agribusiness Devel.*, 711 F.2d 989, 996 (11th Cir. 1983). In addition, "the attempt must occur within a defined relevant market." *Id.* Defendant moves for j.n.o.v. on the grounds that Plaintiff failed to prove a relevant market or that there was a dangerous probability of success.

It is unnecessary for the Court to decide whether, as Defendant contends, Plaintiff's attempted monopoly claim is really a monopoly leveraging claim requiring proof of the relevant market for equipment as well as for paper. At a minimum, Plaintiff was required to prove the relevant market for paper. This Court has already held that Plaintiff's proof regarding the product market for paper was insufficient; therefore Plaintiff's attempted monopolization claim fails for lack of proof of the relevant market.

C. Tortious Interference Claim

The jury found for Plaintiff on its claim that Defendant had tortiously interfered with Plaintiff's business relations. Tortious interference with business relations is a Florida common law tort claim. Its elements are: (1) the existence of a business relationship giving the plaintiff legal rights; (2) an intentional and unjustified interference with that relationship by the defendant; and (3) injury to the plaintiff as a result of that interference. *Manufacturing Research Corp. v. Greenlee Tool Co.*, 693 F.2d 1037, 1040 (11th Cir. 1982). The jury specifically found that Plaintiff had established each of these elements. Defendant moves for judgment n.o.v. on this claim on the ground that Plaintiff failed to show a causal link between Plaintiff's injury (i.e., lost profits and lost value of its business) and unlawful conduct by Defendant.

While the evidence was at trial insufficient to support a verdict for Plaintiff on the antitrust claims, there was ample

evidence from which the jury could have concluded that Defendant tortiously interfered with Plaintiff's business, and that the interference was intentional and had the destruction of Plaintiff's business as its purpose. For example, the jury heard testimony that Marquette repeatedly misrepresented the consequences of using non-Marquette paper in Marquette's machines, that current pricing information was withheld from Plaintiff, and that Plaintiff's name was deleted from Defendant's supplies ordering brochure despite assurances that Plaintiff would continue as a Marquette distributor. Given such evidence, it was not unreasonable for the jury to conclude that the decline in Plaintiff's sales was due to Defendant's tortious conduct. Further, the Court is satisfied that there was sufficient evidence to support the jury's conclusions as to both compensatory and punitive damages. Accordingly, the award of damages for tortious interference with Plaintiff's business relations should stand.

D. Conclusion

For the reasons stated, Defendant's Motion for Judgment Notwithstanding the Verdict will be granted with respect to the unlawful tie-in and the attempted monopolization claims, and denied with respect to the tortious interference with business relations claim.

An appropriate Order will issue.

Robert H. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

Date 3-20-90'

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 87-767-CIV-ORL-19

FILING DATE ILLIGIBLE

T. HARRIS YOUNG AND ASSOCIATES, INC.,
a Florida corporation,

Plaintiff,

vs.

MARQUETTE ELECTRONICS, INC.,
a Wisconsin corporation,

Defendant.

MEMORANDUM

This matter is before the Court on Plaintiff T. Harris Young & Associates, Inc.'s motion for a rehearing to alternatively amend the final judgment or to correct the final judgment pursuant to Fed. R. Civ. P. 59(e) or 60(b), and motion for attorneys' fees pursuant to 15 U.S.C. § 15(a). The matters have been fully briefed and are ripe for disposition. Jurisdiction is based on 28 U.S.C. § 1331, the Sherman Act, 15 U.S.C. § *1 et seq.*, and the doctrine of pendent jurisdiction.

After the jury rendered its verdict in this case, Defendant moved alternatively for a judgment n.o.v., a new trial or a remittitur. By way of a memorandum and order entered on March 20, 1990, the Court granted the requested judgment n.o.v. in favor of Defendant as to Counts 1 and 2 of the complaint, but left intact the jury's verdict in favor of Plaintiff on Count 3. The memorandum and order are silent as to the implied denial of the alternative requests for new trial or remittitur. Plaintiff is concerned that the case might be remanded

for a decision on the alternative motions should the Court's ruling on the motion for judgment n.o.v. be overturned on appeal, and has accordingly moved for a ruling as to each alternative motion. Defendant has requested that the Court address each count specifically, and that the Court set forth its grounds. Defendant's position is that if the Court found insufficient evidence to support the verdict then the evidence must also be insufficient to conditionally deny Defendant's motion for new trial. Defendant thus requests the Court to conditionally grant Defendant's motion for new trial as to Counts 1 and 2, as an alternative to the granting of Defendant's motion for judgment n.o.v., and to grant Defendant's motions for a new trial and a remittitur as to Count 3.

Though deeming much of what is requested by the respective parties to be unnecessary, in the interest of caution and hopefully the conservation of judicial time the Court responds to the several requests as follows:

The Court granted Defendant's motion for judgment n.o.v. on the unlawful tie-in claim for two reasons. First, Plaintiff failed to define at trial the relevant market for equipment. Second, the Court found Plaintiff's evidence regarding the alleged submarket for paper to be insufficient as a matter of law. If on appeal, the Eleventh Circuit Court of Appeals holds that no definition of the relevant market for equipment was necessary, judgment n.o.v. would still be appropriate because of the insufficiency of Plaintiff's evidence regarding the submarket for paper. Should the Eleventh Circuit also find the evidence regarding that submarket to be sufficient, then the jury's verdict would not be against the greater weight of the evidence and no new trial would be needed. The Court granted judgment n.o.v. on the attempted monopolization claim on the ground that, as heretofore noted, Plaintiff's evidence as to the alleged submarket for paper was insufficient as a matter of

law. Again, if this determination were overturned on appeal, the jury's verdict could be reinstated as not against the greater weight of the evidence and no new trial would be needed.

As for Count 3, the Court's memorandum specifically found that there was ample evidence supporting the jury's verdict.

Finally, 15 U.S.C. § 15(a) provides for the award of attorneys' fees to prevailing plaintiffs in antitrust actions. Given that the Court has granted judgment n.o.v. to the Defendant on plaintiff's two antitrust claims, no award of attorneys' fees is allowable.

An appropriate Order will issue.

Robert H. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

4-17-90'
DATE

T. HARRIS YOUNG & ASSOCIATES, INC., a Florida corporation, Plaintiff-Counter Defendant-Appellant/ Cross-Appellee,

v.

MARQUETTE ELECTRONICS, INC., a Wisconsin corporation, Defendant-Counterclaim — Appellee/ Cross-Appellant.

T. HARRIS YOUNG & ASSOCIATES, INC., a Florida corporation, Plaintiff-Appellant, Cross-Appellee,

v.

MARQUETTE ELECTRONICS, INC., a Wisconsin corporation, Defendant-Appellee, Cross-Appellant.
Nos. 90-3252, 90-3364.

United States Court of Appeals,
Eleventh Circuit.

May 20, 1991.

Eli H. Subin, Subin, Shams, Rosenbluth & Moran, P.A., John M. Brennan, Orlando, Fla., for T. Harris Young & Associates, Inc.

Christopher J. Murdoch, Sperling, Slater & Spitz, Paul E. Slater, Melvin S. Newman, Schoenberg, Fisher & Newman, Ltd., Mark P. Cohen, Schoenberg, Fisher & Newman, Ltd., Chicago, Ill., for Marquette Electronics, Inc. in 90-3252 and 90-3364.

Davisson F. Dunlap, William D. Palmer, Carlton, Fields, Ward, Emmanuel, Smith & Cutler, Orlando, Fla., for Marquette Electronics, Inc. in 90-3364.

Appeals from the United States District Court for the Middle District of Florida.

Before HATCHETT and DUBINA, Circuit Judges, and HILL, Senior Circuit Judge.

HILL, Senior Circuit Judge.

This appeal concerns an antitrust and tortious interference with business action. Plaintiff T. Harris Young & Associates, Inc. ("THY") sued defendant Marquette Electronics, Inc. ("Marquette"), alleging an illegal tying arrangement, attempted monopolization, and tortious interference with business because of certain alleged false claims. The jury returned a verdict in favor of THY on all three claims. The district court granted a judgment notwithstanding the verdict on the two antitrust claims. Plaintiff appeals this grant, while defendant appeals the failure to grant such a judgment on the tort claim.[1] We affirm the judgment notwithstanding the verdict on the antitrust claims and reverse the denial of a judgment notwithstanding the verdict on the tort claim.

I. BACKGROUND

A. *Factual History*

Marquette, a Wisconsin corporation, manufactures electrocardiograph ("EKG") and stress testing machines for sale to medical clinics, doctors' offices, and hospitals. There are

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[1]Because of the cross-appeal, both parties are appellants. For convenience, we thus will refer to "plaintiff" and "defendant" throughout the opinion.

approximately nine manufacturers of EKG machines in the United States, and eighteen of stress testing equipment. The equipment utilizes heat sensitive recording paper that displays a graphic line when moved across a heated printhead. Marquette also sells this paper for use in its machines.

THY distributes Marquette recording paper in the southeastern United States, an area including Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and portions of Virginia and Tennessee. THY has no written distribution agreement with Marquette, and the relationship is terminable at will. Despite the instant lawsuit, the relationship continues to this day.[2] Until 1987, THY was the only seller of Marquette paper in the southeast. In 1986, Marquette informed THY of its intention to reduce the discount on supplies it sold THY at wholesale, and THY informed Marquette of its intention to add a competitive generic paper line (Clinical Health Products ("CHP") paper). Marquette then began directly selling its paper in the southeast in 1987.[3]

THY attempted to establish at trial, and argues on appeal, that in attempting to sell its own paper Marquette told customers that non-Marquette paper would damage their machines and that the Marquette equipment warranties would be void if the customers used non-Marquette paper. On appeal, Marquette denies its employees made such statements, but admits they told customers that if defective non-Marquette paper damaged a Marquette machine, Marquette would not

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[2]Pursuant to a written agreement terminable on thirty days notice, THY also acted as a commissioned sales agent for Marquette EKG and stress testing equipment. Marquette terminated this agreement as of October 31, 1987. THY does not claim that the termination was unlawful.

[3]THY does not contend that it was unlawful for Marquette to compete against THY in the southeast region.

repair it for free.[4] No evidence was presented at trial that Marquette ever voided a warranty or service contract.

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[4]Both sides cite the trial court record in support of their respective positions and accuse each other of misstating the record. This court does not take such accusations lightly. Attorneys needlessly waste a court's time where they misstate the record or wrongfully accuse another of doing so. The considerable number of factual disputes on this appeal are particularly disconcerting. We here only review a few of them.

THY claims at page 9 of its opening brief that Timothy Mickelson, a Marquette divisions manager, "described Marquette's suggestion that paper caused printhead problems as 'comical.' " This statement by THY is certainly misleading, if not a misstatement of the record. Mickelson actually testified:

> A: ". . . the basic premise that you're going to put in one or two rolls of paper and have print head problems immediately is sort of comical."
>
> Q: Can paper cause print head problems?
>
> A: Yes.

R13-339-381-382.

THY also alleges at pages 11-12 of its opening brief that Marquette's president, Michael Cudahy, testified (at R22-1530-1531) that customers were advised that "if Young's paper or a non-Marquette paper was used that it would or might cause equipment problems and that warranties and service contract protection would be 'no good' or might be voided". Citing Cudahy for this proposition misstates the record. Cudahy did not testify that using Marquette paper *would* cause problems, or that Marquette employees made such a representation to customers. Cudahy merely testified that there was an official policy "that Marquette would charge for replacement of more than one thermal printhead damaged by the use of non Marquette paper." R22-1530-1531.

THY also cites the testimony of an independent field engineer who serviced Marquette machines, David Morton, (at R21-1072-1073) in support of the above statement at pages 11-12 of its brief. Again, THY misstates the record. Morton did not testify about warranties and service contract protection. Morton simply testified that thermal stripe paper had caused probelms in Marquette machines and that Graphics Control paper (another brand of paper) still does cause problems in Marquette machines. R21-1072-1073.

We could continue to point out misrepresentations of the record, but

At trial, THY sought to define the relevant market for paper customers. THY defined the *geographic* market for paper as the aforementioned nine-state area comprising Young's sales territory as a Marquette distributor. The evidence adduced at trial was that paper prices inside and outside the territory were virtually the same.[5] Furthermore, all suppliers relied on UPS or a similar common carrier for delivery, and while the delivery costs for outside sellers varied from 36.1% higher to 11.7% higher, delivery costs as a percentage of the total cost of the paper were very small.[6] Of the 13 companies supplying Marquette or Marquette-compatible paper to customers in the nine-state area, six were from outside the area, and

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do not feel that such a process is a judicious use of this court's time. We do, however, note that Marquette's accusations regarding misstatements of the record are not all correct. For example, THY at page 9 of its opening brief cites the testimony of Marquette technical services manager James Schmidt at R21-1129-1130 for the proposition that Schmidt testified "that it was not realistic to believe that a printhead would be destroyed by paper." Marquette attacks THY's citation at footnote 1 of its opening brief. However, Schmidt did admit at THY's record citation that the following exchange regarding a report by Schmidt had taken place at his deposition:

> Question: At the foot of this page you wrote, and I quote, Kent felt that heads were being destroyed. I am not sure that is realistic unquote.
> Why did you say that, quote I am not sure that is realistic, unquote?
> Answer: Because I have never personally witnessed a printhead being destroyed by paper.

R21-1129-30. This exchange sufficiently supports THY's citation.

We admonish the attorneys here to refrain from future misstatements to courts in this circuit.

[5]There was evidence that paper sellers outside the region sold paper at a marginally greater price (from .6% higher to 5.1% higher).

[6]Leon Moses, a defense witness, testified that shipping costs as a percentage of the total cost varied from 1.9% to 4%.

three of those six sold Marquette brand paper.[7] Young testified, however, that a customer preference for regional service existed because of the need for emergency deliveries and because the end user pays for transportation costs.

THY defined the *product* market for paper as hospitals with 200 or more beds, despite the sale of identical products to smaller customers. The evidence at trial indicated that the 200+ beds customers accounted for approximately 80% of both plaintiff's and defendant's sales, and that in general approximately 80% of the purchases by hospitals are made by those customers.

B. *Procedural History*

Young brought suit against Marquette, alleging a tying arrangement in violation of Section 1 of the Sherman Act, attempted monopolization in violation of Section 2 of the Sherman Act, and tortious interference with business.[8] The jury found for Young on all three counts. Using a special verdict form, the jury specifically found that the relevant market for EKG recording paper consisted of hospitals of 200+ beds in the southeastern area of the United States consisting of Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and portions of Virginia and Tennessee. The jury awarded $1.4 million on the tying claim,

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[7]Plaintiff sent a survey to suppliers for the southeast area, 13 of whom responded that they sold Marquette or Marquette compatible paper. The six out-of-region suppliers were from California, Michigan, New York, and Wisconsin (Marquette). The non-Marquette suppliers of Marquette brand paper were from California and Michigan.

[8]Section 1 of the Sherman Act prohibits "[e]very contract, combination ... or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1 (1988). Section 2 forbids certain monopolies: "Every person who shall monopolize, or attempt to monopolize ... any part of the trade or commerce among the several states ... shall be deemed guilty of a felony." 15 U.S.C. § 2 (1988).

$1.8 million on the monopoly claim, and over $3 million on the tort claim ($1.25 million compensatory damages plus $1.8 million punitive damages).[9]

Marquette moved for a judgment notwithstanding the verdict and for a new trial on all three counts. The district court gave two reasons for granting the motion on the tying claim: first, THY failed to define the relevant market for the tying product (EKG and stress testing machines); and second, a product market for paper of hospitals with 200+ beds was insufficient as a matter of law. The court granted Marquette's motion on the attempted monopoly claim also because it found the product market to be insufficient as a matter of law. The district court did not grant Marquette's alternative motions for new trial on these two counts.

Regarding the Florida common law tort count, the district court found that there was ample evidence from which the jury could have concluded that Marquette tortiously interfered with THY's business, and that the interference was intentional and had the destruction of THY's business as its purpose. Accordingly, the district court denied Marquette's motions for JNOV and new trial on this count.

II. STANDARD OF REVIEW

[1] A motion for JNOV tests the sufficiency of evidence supporting a jury verdict. *Hessen v. Jaguar Cars, Inc.* 915 F.2d 641, 644 (11th Cir. 1990). Because sufficiency of the evidence is a question of law subject to de novo review, we review the district court's grant or denial of a JNOV under the same standard as the district court applied. *Id.*

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[9]The trial judge instructed Young that it could only recover on one of the counts, however, in order to avoid double recovery for the same wrong.

> *All* of the evidence presented at trial must be considered "in the light and with all reasonable inferences most favorable to the party opposed to the motion." A motion for judgment n.o.v. should be granted only where "reasonable [people] could not arrive at a contrary verdict. . . ." Where substantial conflicting evidence is presented such that reasonable people "in the exercise of impartial judment might reach different conclusion, [sic]" the motion should be denied.

Castle v. Sangamo Weston, Inc., 837 F.2d 1550, 1558 (11th Cir. 1988) (citations omitted).

The district court's evidentiary rulings are discretionary, and we will not disturb them absent a clear showing of an abuse of discretion. *Hessen*, 915 F.2d at 644.

III. DISCUSSION

A. *The Antitrust Claims*

1. The Tying Claim: Where there is no Tie, There is no Claim

[2,3] As an initial matter, defendant argues that plaintiff failed to prove that a tying arrangement existed at all. Defendant contends that, for a tying arrangement to exist, a seller must condition the sale of the tying product on the purchase of the tied product. As plaintiff states in its briefs, the tying product in this case would be "electronic medical equipment," and the tied product would be "electrocardiographic recording paper." Defendant argues that it did not condition the sale of equipment on the purchase of paper, and thus no tie existed. Plaintiff, by contrast, maintains that it must show only coercion by the seller that forced the buyer to purchase the tied product, and that the coercion need not consist of the

withholding of the tying product. In other words, plaintiff maintains that if it shows such coercion, then it has shown a tie and that tie is illegal.

This view is not correct. This circuit has clearly stated that "a tying arrangement is 'an agreement by a party *to sell one product* [the tying product] but only on the conditon that the buyer also purchases a different (or tied) product,' " *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1502 (11th Cir. 1985) (emphasis added) (quoting *Northern Pacific Ry v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958)), *cert. denied*, 475 U.S. 1107, 106 S.Ct. 1513, 89 L.ED.2d 912 (1986). *See also Tic-X-Press, Inc. v. Omni Promotions Co.*, 815 F.2d 1407, 1414 (11th Cir. 1987); *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 711 (11th Cir. 1984); *Kypta v. McDonald's Corp.*, 671 F.2d 1282, 1284 (11th Cir.), *cert. denied*, 459 U.S. 857, 103 S.Ct. 127, 74 L.Ed.2d 109 (1982). In other words, for a tie to exist a seller must withhold product A unless the buyer also selects product B.[10] Only after the existence of a tie is shown is it necessary to determine whether an *illegal* tying arrangement ex-

[10]The cases cited by plaintiff in support of its theory that a defendant need not withhold product A are not helpful to plaintiff. In those cases, the defendant allegedly threatened to withhold one product unless the buyer also selected another product. *See, e.g., Advance Business Sys. and Supply Co. v. SCM Corp.* 415 F.2d 55, 64 (4th Cir. 1969) (among other things, defendant threatened cancellation of copier rental agreements unless customers used defendant's supplies), *cert. denied*, 397 U.S. 920, 90 S.Ct. 928, 25 L.Ed.2d 101 (1970); *Heatransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964, 975-79 (5th Cir. 1977) (Volkswagen of America required distributors and dealers to purchase certain air conditioners as a condition to their also purchasing Volkswagen automobiles), *cert. denied*, 434 U.S. 1087, 98 S.Ct. F.2d at 1282 55 L.Ed.2d 792 (1978); *Tix-X-Press*, 815 F.2d at 1416 (lease of sports and entertainment facility conditioned upon use of certain ticketing service).

All of the tying cases that we have found concern factual situations where the defendant has allegedly withheld, or threatened to withhold, product A. *See, e.g., Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984) (to receive surgery at hospital, patients

ists.[11] A tying arrangement will be *per se* illegal if: (1) the seller possesses sufficient economic power in the tying product to force the buyer to accept the tied product;[12] and (2) a "not

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had to obtain anesthesiological services from firm designated by hospital); *Fortner Enters., Inc. v. United States Steel Corp.*, 394 U.S. 495, 89 S.Ct. 1252, 22 L.Ed.2d 495 (1969) (plaintiff alleged that as a condition of obtaining certain loans from defendant for purchase and development of land, plaintiff had to agree to erect pre-fabricated house manufactured by parent on each of the lots purchased with loan proceeds); *International Salt Co. v. United States*, 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20 (1947) (lease of defendant's equipment conditioned upon purchase of salt from defendant); *International Business Machines Corp. v. United States*, 298 U.S. 131, 56 S.Ct. 701, 80 L.Ed. 1085 (1936) (lease of IBM machines conditioned upon use of IBM tabulating cards); *Amey*, 758 F.2d 1486 (plaintiff contended that loan from bank was conditioned upon use of certain lawyers for title search); *Olmstead v. Amoco Oil Co.*, 725 F.2d 627 (11th Cir. 1984) (lease of Amoco service station allegedly conditioned upon purchase of car wash); *Kypta*, 671 F.2d 1282 (as a condition of obtaining McDonald's franchise, plaintiffs were required to execute lease agreement for restaurant premises); *Faulkner Advertising Assocs. v. Nissan Motor Corp.*, 905 F.2d 769 (4th Cir. 1990) (plaintiffs alleged that, as a condition of purchasing automobiles from Nissan, Nissan required dealers to purchase services relating to the advertising of Nissan automobiles by a certain ad agency); *Beard v. Parkview Hosp.*, 912 F.2d 138 (6th Cir. 1990) (to receive surgery at hospital, patients had to obtain radiological services from hospital-designated provider).

[11]Under plaintiff's theory, a tying arrangement is by definition illegal. It is, however, easy to imagine legal tying arrangements. As the Supreme Court has explained, "if one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself." *Northern Pacific Ry.*, 356 U.S. at 7, 78 S.Ct. at 519. Similarly, the Court has noted that a "seller who ties the sale of houses to the provision of credit simply as a way of effectively competing in a competitive market does not violate the antitrust laws." *Jefferson Parish*, 104 S.Ct. at 1558 n. 18 (referring to the credit bargain offered to Fortner in *United States Steel Corp. v. Fortner Enter., Inc.*, 429 U.S. 610, 97 S.Ct. 861, 868, 51 L.Ed.2d 80 (1977)).

[12]As the Supreme Court has explained, tying arrangements are condemned "when the seller has some special ability — usually called 'market power' — to force a purchaser to do something that he would not do in a competitive market." *Jefferson Parish*, 104 S.Ct. at 1559.

insubstantial amount of interstate commerce in the market of the tied product is involved. *Tic-X-Press*, 815 F.2d at 1414.[13]

[4,5] Affirmance of a JNOV is proper even if based on a rationale different from that of the district court. *Wilson v. Bicycle South, Inc.*, 915 F.2d 1503, 1506 (11th Cir. 1990). THY does not even allege that Marquette withheld or threatened to withhold electronic medical equipment unless its customers selected Marquette electrocardiographic recording paper. Because THY has presented no evidence that a tie exists, we affirm the grant of JNOV on the tying claim.

2. The Monopoly Claim: Where there is no Market, there is no Monopoly

[6,8] The offense of monopolization under Section 2 of the Sherman Act[14] contains two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1966). The offense of attempted monopolization requires specific intent on the defendant's part to bring about a monopoly and a dangerous probability of success. *Quality Foods v. Latin Am. Agribusiness Dev. Corp.*, 711 F.2d 989, 996 (11th Cir. 1983). Furthermore, like the monopolization offense itself, the attempt must happen in a defined relevant market. *Id.* The relevant market is defined by both a pro-

[13]Tying arrangements with these attributes are illegal *per se* because they "exhibit a high likelihood of anticompetitive impact and offer virtually no prospect at all of enhancing competition." *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368, 374 (5th Cir. 1977).

[14]For the relevant text of the statute, see *supra* note 8.

duct and a geographic dimension. *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256, 276 (5th Cir. 1978), *cert. denied*, 440 U.S. 939, 99 SCt. 1289, 59 L.Ed.2d 499 (1979); *Heatransfer*, 553 F.2d at 980.

[9] It is the analysis of the relevant market for electrocardiographic recording paper that is dispositive of the monopoly claim in the case before us. The district court denied Marquette's motion for JNOV based on the insufficiency of the geographic market, but granted the motion based on the insufficiency of the product market. We will assess both potential bases for granting the JNOV. Because the relevant market is essentially a question of fact, the jury's findings concerning the market will be overturned only if clearly erroneous or where there is no evidence to support them. *Associated Radio Serv. Co. v. Page Airways, Inc.*, 624 F.2d 1342, 1348-1349 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030, 101 S.Ct. 1740, 68 L.Ed.2d 226 (1981).

[10] We first address the evidence on the geographic dimension. The geographic dimension is the area in which the product or its reasonably interchangeable substitutes are traded. *L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F.2d 414, 423 (11th Cir. 1984). Price data and such corroborative factors as transportation costs, delivery limitations, customer convenience and preference, and the location and facilities of other producers and distributors must be considered in determining the relevant geographic market. *Id.* A geographic market is only relevant for monopoly purposes where these factors show that consumers within the geographic area cannot realistically turn to outside sellers should prices rise within the defined area. *Id.* at 424.

[11] The evidence presented at trial on the geographic market is reviewed above at page 820. The district court found THY's evidence sufficient to present a jury question because

of the testimony that a customer preference for regional service existed because of the need for emergency deliveries and because the end user pays for transportation costs. On appeal, THY also relies on this evidence to prove the geographic market for recording paper. Such evidence, however, is not sufficient to present a jury question. THY presented no evidence that could support an inference that consumers within the nine-state area could not turn to outside sellers if the prices increased within the nine-state area. In fact, the evidence indicated that consumers could and did turn to outside suppliers. As discussed in Section I.A. above, the prices inside and outside the territory were virtually the same, all suppliers relied on UPS or a similar common carrier for delivery, and delivery costs had little effect on the total cost of the merchandise. Moreover, 6 of the 13 suppliers of Marquette or Marquette-compatible paper to customers in the nine-state area were from outside the southeast area, and two of those outside sellers besides Marquette actually sold Marquette brand paper.

We thus find that, even viewing the evidence in the light most favorable to THY, a JNOV was proper on the monopoly claim because of the failure to define the geographic dimension of the market.

Even if THY had sufficiently defined a geographic dimension, the JNOV would still be proper because THY failed to provide sufficient proof of the product dimension of the market.

> [T]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves constitute product markets for antitrust purposes. . . . The boundaries of such

> a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

Heatransfer, 553 F.2d at 980 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 82 S.Ct. 1502, 1523-24, 8 L.Ed.2d 510 (1962)). Citing several cases,[15] THY contends

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[15]*See, e.g. Heatransfer*, 553 F.2d 964, *International Boxing Club of New York, Inc. v. United States*, 358 U.S. 242, 79 S.Ct. 245, 3 L.Ed.2d 270 (1959), *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291 (9th Cir.) *cert. denied*, 459 U.S. 1009, 103 S.Ct. 364, 74 L.Ed.2d 400 (1982). These cases are discussed in the text and footnotes below.

THY also cites *United States v. Yellow Cab Co.*, 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947), *overruled, Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984) (overruling intra-enterprise conspiracy doctrine begun in *Yellow Cab*). The Supreme Court in *Yellow Cab* upheld the sufficiency of a complaint that charged, among other things, that the defendants had established control over a substantial segment of the entire market of cab operations in four cities (86% of the Chicago market, 15% of the New York City market, 100% of the Pittsburgh market, and 58% of the Minneapolis market) and had exploited its control by extracting exclusive purchasing agreements from its owned cab companies, thus excluding other cab manufacturers from the affected market. 67 S.Ct at 1564-65. THY argues that the market in our case can be limited to 200+ bed hospitals because they too are the "principal consumers when it comes to the purchase of paper." THY misinterprets *Yellow Cab*. *Yellow Cab* is irrelevant to the concept of limiting a product market to a portion of customers and then determining the percentage of that limited market held by the defendant. The plaintiff in Yellow Cab did not try to limit the market to a segment of customers and then allege that the defendant's percentage of control of that limited market resulted in a monopoly; rather, in essence, the plaintiff alleged that the defendant controlled a certain percentage of cab sales in the entire market in the four cities. Moreover, even if the plaintiff had tried to limit the market, the Supreme Court merely held that the plaintiff could go forward

that 200+ bed hospitals, which account for approximately 80% of the purchases by hospitals, constitute such a submarket and are the relevant product market in this case.

[12] While a relevant product market can be limited to a portion of customers, such a limitation must be based on a distinction in the *product* sold to those customers. If, for example, a product is specially designed for a certain group of purchasers and the suppliers concentrate their efforts almost exclusively on those purchasers, as in *Heatransfer*, 553 F.2d 964, the product dimension may be limited to the sale of that product to those purchasers.[16] Similarly, where one product is distinct from another because of its salability, as in *International Boxing Club of New York, Inc. v. United States*, 358 U.S. 242, 79 S.Ct. 245, 3 L.Ed.2d 270 (1959), the relevant market can consist solely of that product.[17] Additionally where a type of pur-

and attempt to prove its allegations on the merits; the Court did not rule on whether the plaintiff had sufficiently proven its allegations.

[16]In *Heatransfer*, the jury found that the relevant market consisted of the sale of air conditioners for only Volkswagen, Porsche, and Audi automobiles (all imported by Volkswagen of America), rather than the sale of air conditioners for all automobiles. The court of appeals affirmed the jury's finding based on evidence that the companies selling air conditioners for those cars concentrated almost exclusively on those cars because of the distinct engineering problems associated with the Volkswagen imports. *Id.* at 980. Citing *Heatransfer*, THY argues that its evidence that sales efforts were concentrated on 200+ bed hospitals is sufficient to uphold the jury's finding of a market limited to 200+ bed hospitals. This argument, however, misstates the teaching of *Heatransfer*. That case stands for the proposition that where suppliers specially design a product for a certain group of purchasers and concentrate their sales efforts almost exclusively on that group of purchasers, a relevant market can exist consisting of the sale of that product to those purchasers. In our case, by contrast, EKG recording paper is not designed for 200+ bed hospitals; rather, there is no difference in the paper sold to those hospitals from that sold to smaller hospitals, clinics, and doctors' offices. *Heatransfer* thus does not advance THY's argument.

[17]Contrary to THY's assertion, the market in *International Boxing* was limited based on a distinction in the product not a distinction in the customers. In *International Boxing*, the two products were championship boxing

chaser is relevant because the defendant is such a purchaser, the market can be limited to a type of product that such a purchaser would buy.[18]

[13] THY has failed to provide evidence that the market for EKG recording paper should be limited to 200+ bed hospitals because of a distinction in the paper sold to those hospitals. Rather, from this record it appears that the paper used by 200+ bed hospitals, smaller hospitals, clinics, and doctor's offices does not differ. We thus conclude that, even viewing the evidence in the light most favorable to THY, a JNOV on

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contests and nonchampionship boxing contests. The district court found that the relevant market consisted of championship boxing contests instead of all professional boxing events. 79 S.Ct. at 247. Because of the detailed findings regarding the salability of championship boxing contests as opposed to nonchampionship fights, the Supreme Court determined that the district court was not clearly erroneous "in concluding that nonchampionship fights [were] not 'reasonably interchangeable for the same purposes' as championship contests." *Id.* at 250. The product in our case is EKG recording paper. Because there is no distinction between paper sold to 200+ bed hospitals, and paper sold to smaller hospitals, clinics, and doctors' offices, *International Boxing* does not support THY's attempted limitation on the market to 200+ bed hospitals.

[18]In *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291 (9th Cir.), *cert. denied*, 459 U.S. 1009, 103 S.Ct. 364, 74 L.Ed.2d 400 (1982), the relevant type of purchaser was national concessionaires because appellant Sportservice was a national concessionaire, and the product was concession franchises. The district court limited the product market to the 118 concession franchises for which national concessionaires would compete (because of the net profits or gross receipts those franchises yielded), instead of including all grill-size or smaller franchises, and the Ninth Circuit affirmed. *Id.* at 1300. THY points out that the concession franchises were "distinct purchasers of concessionaire services," seemingly implying that the market in our case could thus also be limited to certain purchasers (200+ bed hospitals). THY misunderstands *Twin City Sportservice*. The concession franchises simply cannot be compared with 200+ bed hospitals because the former were a product, while the latter are *purchasers* of a product.

the monopoly claim was proper also because of THY's failure to define the product dimension of the market.[19]

B. *The Tort Claim: Without Tortious Interference, there is no Tort*

[14,15] THY's tort claim relates to damages for lost CHP sales. THY Reply B. at 40 n. 9. The claim for tortious interference with business is a Florida common law claim. To prevail on a claim of tortious interference with a business relationship under Florida law, a plaintiff must establish four elements: "(1) the existence of a business relationship, not necessarily evidenced by an enforceable contract; (2) knowledge of the relationship on the part of the defendant; (3) an intentional and unjustified interference with the relationship by the defendant; and (4) damage to the plaintiff *as a result of* the breach of the relationship." *Tamiami Trail Tours, Inc. v. Cotton*, 463 So.2d 1126, 1127 (Fla. 1985) (emphasis added). Where the damages are for lost profits, there must be "some standard by which the amount of damages may be adequately determined." *W.W. Gay Mechancial Contractor, Inc. v. Wharfside Two, Ltd.*, 545 So.2d 1348, 1351 (Fla. 1989).

[16] THY argues that "[e]vidence of Marquette's extensive region-wide interference with Young's business through its telemarketing and service representatives who contacted Young's customers followed by Young's lost sales and decreasing profitability was sufficient to show causation." THY Reply B. at 40. If THY has not really provided evidence of tortious interference by Marquette "telemarketing and service representatives who contacted Young's customers," then the third element obviously fails, and we need not even reach the

[19]Because of our disposition of the antitrust issues, we need not also address Marquette's attack on THY's antitrust damages model.

causation question in the fourth element. We thus must analyze the evidence regarding this alleged interference by Marquette employees.

Although THY claims that Marquette's interference was "extensive," THY only introduced evidence regarding statements by Marquette employees at a small number of hospitals in the nine-state southeast region. For six of the hospitals, the evidence THY introduced was the testimony and notes of THY telemarketer Cynthia Cherry and THY general manager William Lofdahl, who allegedly spoke with hospital employees who allegedly spoke with Marquette employees. Because of the importance of this evidence to THY's case, we will discuss in detail why this evidence is inadmissible hearsay.

Hearsay "is a statement, other than one made by declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed.R.Evid. 801(c). The rationale behind the hearsay rule is the untrustworthiness of hearsay statements. *United States v. Brown,* 548 F.2d 1194, 1205 n. 19 (5th Cir. 1977). Hearsay presents substantial risks of insincerity and faulty narration, memory, and perception. *Id.* (quoting Morgan, *Hearsay Dangers and the Applications of the Hearsay Concept,* 62 Harv.L. Rev. 177, 218 (1948)).

At trial, Cherry testified that she had spoken to a Mr. Brinkley at the V.A. Hospital in Asheville, North Carolina. According to Cherry's testimony, Brinkley told her that he "wanted to try the new brand of CHP paper," but "was told [by Marquette employees] that the printheads would be damaged" and that "the warranty would be completely voided if he used anyting but Marquette brand paper." R24-301. A note from Cherry to Lofdahl introduced as an exhibit also indicated the same Marquette statements to Brinkley. THY argues that the statement by Brinkley was not hearsay because

it was not offered for the truth of the matter asserted; in fact, THY contends that it specifically denied the truth of the content of the statements.

THY misunderstands the hearsay analysis of this evidence. We begin our analysis by noting that the witness (Cherry) was testifying to what another person said outside of court. That other person (Brinkley) is thus the out-of-court declarant. We next address the "matter asserted" — that is, we determine the matter that the declarant (Brinkley) asserted. If the matter asserted were "non-Marquette paper will damage Marquette equipment and void the warranty," THY would be correct in arguing that hearsay does not exist because THY was not trying to prove the truth of the matter asserted; instead, THY was trying to prove that Marquette employees made the comments. Brinkley, however, did not make the above assertion. Rather, the matter Brinkley asserted was (simplified for analysis) "Marquette employees said that non-Marquette paper will damage Marquette equipment and void the warranty." This distinction is critical because THY did try to prove that "Marquette employees said ...;" that is, THY did try to prove the truth of the matter asserted by the declarant. While Brinkley could have testified to what Marquette told him,[20] Cherry's testimony and note are inadmissible hearsay. Because Cherry's testimony and notes regarding the other four hospitals that she contacted follow the same pattern, this evidence is also inadmissible hearsay.[21]

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[20]Brinkley's testimony on this subject would not have been hearsay because THY would not have been trying to prove the truth of the matter asserted ("non-Marquette paper will damage Marquette equipment and void the warranty") by the declarant (Marquette employees). For what Brinkley did permissibly testify to, see note 24.

[21]Cherry testified at trial that she had spoken to a Mary Torrance at Myrtle Beach Air Force Base. According to Cherry, Ms. Torrance told here that Marquette employees "had told her that we were practically nonexistent, that we were not able to sell them supplies." R24-303. Again,

The evidence from William Lofdahl suffers from the same fault as the evidence from Cherry. Lofdahl also testified to a conversation he allegedly had with Mr. Brinkley at the V.A. Hospital in Asheville, North Carolina, stating that Brinkley said "that MEI said it [CHP paper] would possibly damage the machine, they wouldn't service the machine if he used our product." R24-326. Lofdahl further testified that he talked to a Sally Morrell from Davie County Hospital in North Carolina, who told him "that MEI service ... told them that CHP-020 paper has a wax coating on it and would damage their new ... systems. And, if they continued to use it MEI would not extend warranty service." PX 50; R24-325. Again, THY has tried through this evidence to prove that "Marquette employees said. . . . THY has thus in both instances tried to prove the truth of the matter asserted by the out-of-court declarant, and the evidence is consequently inadmissible hearsay.[22]

THY also introduced a note from Cherry of this conversation as an exhibit. Cherry also testified that she spoke to a woman named Selma at East Jefferson Hospital who told her that East Jefferson "had been told by Marquette that they could not use another paper, meaning the CHP brand, that they had to go back to purchasing the Marquette brand." R24-304. Again, THY introduced a note from Cherry of the conversation. At Betsy Johnson Hospital, Cherry testified that Arlene said that she was told that the "generic paper ... was not able to be used in her machine, that something would go wrong with it, that she had to change it back to the Marquette brand." R24-305. THY also introduced Cherry's note of this conversation. THY also introduced a note from Cherry of a conversation she allegedly had with a Maria Bullock at Trident Regional Medical Center. According to Cherry, Ms. Bullock said that Marquette said in a memo that the hospital "should buy thier [sic] supplies from them only." PX 49; R24-310.

[22]We note that Sally Morrell, like Brinkley at the V.A. Hospital in Asheville, could also have testified to what Marquette employees personally told her. Morrell's deposition testimony, however, reveals that her exclusive source of information about what Marquette employees said is what the nursing director at the hospital said to her. As can be gathered from our hearsay analysis in the text, Morrell's testimony about what Marquette employees said is inadmissible hearsay.

THY also introduced the testimony of Michael Marrow, director of bio-medical engineering at Wake Medical Center in North Carolina, and a phone survey allegedly containing statements by hospital employees. As with Cherry's and Lofdahl's testimony, Marrow testified that another person said to him that a Marquette employee said "[t]hat the warranty might be void if the use of non-Marquette — if we use non-Marquette paper." R13-339-241. We need not repeat our analysis to conclude that this testimony is inadmissible hearsay. In the phone survey, the interviewers allegedly wrote down what hospital employees said Marquette employees said. Neither the hospital employees nor the interviewers are identified, and it is not even clear whether the hospital employees themselves actually spoke with Marquette employees. Again, this evidence is offered to prove that "Marquette employees said ...," and it is inadmissible hearsay.

[17] THY argues that even if its evidence is hearsay, the evidence fits under the state of mind exception to the hearsay rule in Fed.R.Evid. 803(3). Fed.R.Evid. 803(3) reads in part as follows:

> The following are not excluded by the hearsay rule ...:
>
> (3) **Then existing mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind ... (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed.

Before a statement can be admitted under Rule 803(3) to show that a declarant's then existing state of mind, the declarant's state of mind must be a relevant issue. *Prather v. Prather*, 650 F.2d 88, 90 (5th Cir. Unit A July 1981). Here, THY admits that it was trying to prove that Marquette employees had made

tortious comments. The relevant issue is thus whether Marquette employees made those comments, not the state of mind of the hospital employees. Rule 803(3) is also of no avail to THY because THY tried to use the alleged statements "of memory or belief" by the hospital employees "to prove the fact remembered or believed." That is, THY tried to use the out of court statements that "Marquette said ..." to prove that "Marquette said. . . ." The prohibition against such use of statements "is necessary to avoid the virtual destruction of the hearsay rule." Fed.R.Evid. 803, notes of advisory committee on 1972 proposed rules.[23]

[18] The evidence is not admissible under the hearsay exception in Fed.R.Evid. 803(6), either. Fed.R.Evid. 803(6) reads in part as follows:

> The following are not excluded by the hearsay rule . . .:
>
> 6) **Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowl-

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[23]The cases THY cites are unavailing. *See, e.g., Morris Jewelers, Inc. v. General Elec. Credit Corp.*, 714 F.2d 32, 34 (5th Cir. 1983) (recognizing that Rule 803(3) does not authorize admission unless declarant's state of mind is relevant, and finding that the declarants' states of mind in that case were relevant); *Herman Schwabe, Inc. v. United Shoe Mach. Corp.*, 297 F.2d 906, 914 (2nd Cir. 1962) (recognizing that statement of a customer as to his reason for not dealing with a supplier was not usable as evidence of the facts recited), *cert. denied*, 369 U.S. 865, 82 S.Ct. 1031, 8 L.Ed.2d 85 (1962); *Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs, Inc.*, 635 F.2d 118, 128 (2nd Cir. 1980) (customer statements admitted because offered only to prove reason for not dealing with supplier), *aff'd*, 456 U.S. 556, 102 S.Ct. 1935, 72 L.Ed.2d 330 (1982).

> edge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation.

For this exception to be available, all persons involved in the process must be acting in the regular course of business — otherwise, an essential link in the trustworthiness chain is missing. Fed.R.Evid. 803, notes of advisory committee on 1972 proposed rules. *See also Florida Canal Indus., Inc. v. Rambo*, 537 F.2d 200, 202-03 & n. 5 (5th Cir. 1976) (decided under the former version of the Federal Business Records Act); McCormick on Evidence § 310, at 879 (3d law. ed. 1984). Because it was not the regular course of business for the various out-of-court declarants to report to Cherry, Lofdahl, or the survey interviewers, Rule 803)(3) is of no avail to plaintiff.

[19] THY conducted a seven-day jury trial that produced reams of trial transcripts and evidence. Nevertheless, THY failed to produce admissible evidence sufficient to support a rational jury determination of tortious interference with business.[24] We thus reverse the district court's denial of

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[24]The remaining evidence of Marquette employee contact with THY customers includes the testimony of Mr. Brinkley from the V.A. Hospital in Asheville. Mr. Brinkley merely testified (through a deposition introduced at trial) that Marquette employees had told him that some types of paper had caused problems with printheads and that warranty coverage would not be provided where such problems occurred. R13-339-37. He also testified that Marquette employees said "it might be possible to use a lot of different types of paper." *Id.* (It will be recalled from page 826 above that Cherry's testimony was offered to the effect that Brinkley had told Cherry that Marquette employees had told him that only Marquette paper could be used. We now see that Brinkley's own testimony, which is not hearsay, is that Marquette employees made no such threats. Tenuously, one might argue for the admissibility of the Brinkley statement to Cherry as being material to the credibility of Brinkley — as being a statement

inconsistent with his trial testimony. *See United States v. Sisto*, 534 F.2d 616, 622-23 (5th Cir. 1976). The admission of his statement to Cherry on such a ground would not aid THY in establishing evidence of threats. The inconsistent statement might well go to credibility, but it is not admissible to support the truth of the inconsistent statement. *See id.)*

The evidence also includes the testimony of Kathryn Lloyd, a purchasing department employee at North Broward Medical Center who signed a change order from CHP to Marquette paper. Her testimony is not helpful to THY, as Ms. Lloyd never spoke to any Marquette employee about the change order. R13-339-204. THY also cites the testimony of Sharon Popeil, an EKG technician at North Broward Medical Center. THY's record citation, R21-1023, does not support its contention that Marquette employees told the hospital that use of non-Marquette paper could result in a loss of warranty and of service contracts. Popeil did testify that Marquette service personnel said that problems with their equipment were caused by the paper. Popeil, though, also seems to have concluded independently that the equipment problems were caused by the paper. Referring to the CHP paper earlier in her testimony, she stated that it "was causing our machines to break down," R21-1018, and went on to comment that "when I went to feel the paper, and when we went to load it, it was much thinner than paper we had used in the past," R-21-1019, and to note that she experienced no problems with the equipment after switching to Marquette paper. R21-1020.

THY also cites the testimony of some present and former Marquette employees. The two former employees are division manager Timothy Mickelson and plant manager David Taylor. Mickelson testified that Marquette employees had advised some customers that they were better off using Marquette paper, but also added that "[t]hat type of response grew out of the service department, mainly from problems that we had with Graphic Controls paper [(not CHP paper)]." R13-339-342. Mickelson also testified that he could not even remember any specific customers who had been so advised. R13-383. Taylor testified on direct that Marquette general manager Terry Johnson told him that he had instructed the Marquette telemarketers to tell customers that if they used non-Marquette paper their warranty and service contract would be "no good." R25-399-400. While this testimony tends to support THY's position, it is insufficient because Taylor testified he had no knowledge about what was actually said to customers, R25-408, and because Taylor also testified that Terry Johnson had told him that the telemarketers were instructed to tell customers that "if print heads burned out and they were using non-Marquette paper, it wouldn't be under the warranty." R25-407. This

Marquette's motion for a JNOV and set aside the jury verdict on the tort claim.[25]

IV. CONCLUSION

For the foregoing reasons, the district court's grant of JNOV on the tying claim and on the monopoly claim is AFFIRMED. The district court's denial of JNOV on the tort claim is REVERSED.

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discrepancy in what Johnson told Taylor is important because only the former testimony supports THY's position.

The testimony of the present Marquette employees is that of senior account representative Tina Calenberg and senior field service engineer Kent McSwain. Calenberg testified, among other things, that she saw a letter stating in part that if a customer was "using a competitor's paper and the printhead was burnt out because of that we would replace it free of charge the first time." R13-339-76. Neither this testimony nor any other of Calenberg's testimony amounts to Marquette employees stating that THY's CHP paper would damage equipment or void the equipment warranty. McSwain's testimony does not support this proposition either — he merely testified that Marquette had a policy of charging for the replacement of more than one thermal printhead if that printhead had been damaged by the use of non-Marquette paper. R13-339-293, 296, 308-10. THY also points to a letter dated October 29, 1986, from Marquette president Michael Cudahy to Harris Young and another Marquette distributor. This letter is also unhelpful to THY, as Cudahy stated merely that he recognized that other suppliers might tempt them with their products, that not all thermal papers are the same, and that Marquette would be cautioning customers "about potential damage to their equipment, for example, from improper chart paper." PX18. Cudahy did not threaten to tell customers that THY's CHP paper would damage their equipment or threaten to void warranties.

[25]Because of our disposition of the tort claim, we need not address certain other issues raised by the parties concerning the calculation of lost profits and the jury instruction on punitive damages.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 90-3252
NO. 90-3364

T. HARRIS YOUNG & ASSOCIATES, INC.,
a Florida corporation,
Plaintiff-Appellant,
Cross-Appellee,

v.

MARQUETTE ELECTRONICS, INC.,
a Wisconsin corporation,
Defendant-Appellee,
Cross-Appellant.

Appeal from the United States District Court
for the Middle District of FLorida

SUPPLEMENT TO SUGGESTION OF REHEARING EN BANC AND PETITION FOR REHEARING

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The Court has reversed the district court's denial of a judgment n.o.v. on the tortious interference claim because "THY failed to produce *admissible* evidence sufficient to support a rational jury determination..." (931 F.2d 816 at 828). The question of admissibility or not could only support a ruling that there was judicial error which would warrant a new trial. The motion for judgment n.o.v. tests only the sufficiency of the evidence not its admissibility. *Boeing Company v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc); and *Gregg v. U.S. Industries, Inc.* 887 F.2d 1462, 1468 (11th Cir. 1989). The only appropriate remedy for an error in the admission of evidence is a new trial, which is subject to a different standard of review than is a judgment n.o.v. *Gregg, supra* at 1469; and *Deas v. PACCAR, Inc.*, 775 F.2d 1498, 1503-1504 (11th Cir. 1985). *Montgomery Ward and Company v. Duncan*, 311 U.S. 243, 61 S.Ct. 189, 85 L.Ed. 147 (1940).

Therefore, if Young's Suggestion of Rehearing En Banc and Petition for Rehearing is denied on the tortious interference claim (there was legally sufficient evidence other than the arguable hearsay), then a new trial should be ordered on the tortious interference claim because of the judicial error in the admission of evidence of which Marquette has complained.

Respectfully submitted this 21st day of June, 1991.

/s/ELI H. SUBIN

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THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-3252 & 90-3364

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
AUG 30 1991
MIGUEL J. CORTEZ
CLERK

T. HARRIS YOUNG & ASSOCIATES, INC.
A Florida corporation,

Plaintiff-Counter defendant-Appellant/Cross-Appellee,

versus

MARQUETTE ELECTRONICS, INC.,
a Wisconsin corporation,

Defendant-Counterclaim-Appellee/Cross-Appellant

On Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

(Opinion May 20, 1991, 11th Cir., 19____, ____F.2d____).

Before: HATCHETT and DUBINA, Circuit Judges, and Hill, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Joseph W. Hatchett

UNITED STATES CIRCUIT JUDGE

ORD-42
(9/90)

JURY INSTRUCTION
(Tying Arrangement)

[THE COURT:] Section one provides that every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states is declared illegal.

Although section one of the Sherman Act is literally all encompassing, it precludes only those contracts or combinations which unreasonably restrain competition. However, there are certain agreements or practices which, because of their pernicious effect on competition and lack of any redeaming virtue, are conclusively presumed to be unreasonable, and, therefore, illegal, without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. Among the practices which the law deams to be unlawful in and of themselves are what we call tying arrangements.

A per se violation, such as a tying arrangement, is an act which once proven is no longer defensible on the ground of good business judgment, or as having been reasonable under the circumstances, or any other ground.

Briefly, it is an act which is viewed as being so opposed to the strong and established public policy in favor of free competition that once established it cannot be explained away, and harmful effects flowing therefrom cannot be justified or otherwise mitigated.

With regard to these acts, these types of restraints, you must not weight the reasonableness or unreasonableness of the restraint, as they are deemed under the law to be per se unlawful, or to be unreasonable restraint of competition as a matter of law.

The conduct, specific conduct which Young claimed violated this section of the Act is Marquette's alleged tie of the purchase of its electrocardiographic recording papers to the sale and service of its medical equipment in a way that coerced the users of its equipment to become consumers of its electrocardiographic recording papers. A tying arrangement is defined as use by a party of its power in the market for one product, which is known as the tie in product to coerce buyers or to force buyers, in effect, to purchase a different product known as the tied product. It is not necessary that the tie-in be imposed by means of an express contractual provision. Such arrangements are inherently anticompetitive and are per se unlawful under section one of the Sherman Act because the seller with market dominance in one product is able to force the purchase of another product in a different market, thereby foreclosing competition in that market as to the second or tied product. In order to establish the existence of such an illegal tying arrangement, the burden is upon Young to prove each of the following elements by a preponderance of the evidence:

First, a tying and a tied product.

Second, evidence of actual coercion by Marquette that in fact forced buyers to purchase the tied product.

Third, Young must prove that Marquette had sufficient econmic power or significant market leverage in the tying product market to appreciably restrain or foreclose free competition in the market for the tied product.

Fourth, that there were anti-competitive effects in the tied product market as a result of Marquette's actions.

Five, that the alleged tying arrangement involved a not insubstantial amount of commerce. In deciding this latter question, you must look to the total dollar volume of sale in interstate commerce by Marquette of the products, if any,

which you find to have been tied to the alleged tying product. And the court charges you that annual sales in excess of 150 thousand dollars a year are not insubstantial.

Lastly, Young must prove that it suffered injury or damage to its business or property as a proximate result of Marquette's violation of the antitrust laws in forcing the alleged illegal tying arrangement. The injury must be appreciable, that is, sufficient to be recognized as having occurred, and, such injury or damage must have been a proximate result and direct and natural consequence of the illegal tying arrangement.

The key to a tying arrangement's illegality and anti-competitiveness is the seller's ability to force buyers to purchase the tied product, not because the seller has a better product or lower price, but because of the seller's dominance or control over the market for the tying product. It is unlawful to misuse power in one market to foreclose competition, to gain a competitive advantage or to destroy a competitor in a second market.

The standard of sufficient economic power does not require that Marquette have a monopoly or even a dominant position throughout the market for the tying product. Economic power over the tying product market can be sufficient even though the power falls short of dominance, and even if the power exists only with respect to some of the buyers in the market. Young is required only to show Marquette has the power within the market for the tying product to raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market.

Economic power be may inferred from the desirability of the tying product to consumers or from the uniqueness of and, its attributes. Market power may also be shown if you find Marquette processes a substantial market share in the tying

product market. General acceptance of the tie among consumers is also evidence of market power.

If you find Young has failed to prove any of these essential elements that I have just discussed in its tying arrangement claim, then, of course, your verdict will be for Marquette.

On the other hand, it follows if you find that Young has established each of those elements by a preponderance of the evidence, then your verdict would be for Young.

Now, in deciding whether Marquette coerced buyers into purchasing its recording paper for use in its equipment, the fundamental question is whether the buyer decided on its own to go along with the purchase of defendant's recording paper as suggested by the defendant, or whether, on the other hand, the buyer because of defendant's coercion, that is, Marquette, effectively gave up the freedom to make its own decision about the type of recording paper it would buy.

Young cannot prove coercion by simply showing that the defendant made strong efforts to persuade, encourage, or cajole users of its equipment to use its recording paper. Nor is it enough that the defendant has given buyers an economic incentive to buy Marquette recording paper for use in Marquette equipment. In order to find coercion you must conclude that the defendant, Marquette, has forced buyers to buy both products, and any appearance of choice was merely a sham.

You are further charged in order for a buying arrangement to be illegal the defendant must possess sufficient economic power with respect to the tying product to restrain free competition appreciably in the market for the tied product by raising its prices without losing an appreciable amount of its business, or to impose burdensome terms, such as a tie-in that could not be exacted in a competitive market.

Market power requires a showing that would-be competitors in the tied market could not themselves offer the tying product on competitive terms; that is, that the defendant has some advantage over rivals in producing the tying product, or there are substantial entry barriers into the tying product market. In other words, market power means that the defendant has some special ability to force a purchaser of recording paper to do something that the purchaser would not do in a competitive market.

SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, then according to the rules of the common law.

SHERMAN ANTITRUST ACT

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub.L. 94-145, § 2, 89 Stat.801; Nov. 16, 1990, Pub.L. 101-588, § 4(a), 104 Stat. 2880.)

CLAYTON ACT

§ 14. Sale, etc., on agreement not use goods of competitor

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or un-

patented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale of such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monoply in any line of commerce.

Oct. 15, 1914, c. 323, § 3, 38 Stat. 731.

§ 15. Suits by persons injured

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of

interest under this section for any period is just in the circumstances, the court shall consider only —

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims of defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(As amended Sept. 12, 1980, Pub.L. 96-349, § 4(a)(1), 94 Stat. 1156; Dec. 29, 1982, Pub.L. 97-343, 96 Stat. 1964.)

Rule 50
RULES OF CIVIL PROCEDURE

(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with the party's motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(2)

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No. 91-679

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

T. HARRIS YOUNG & ASSOCIATES, INC.,
Petitioner,

v.

MARQUETTE ELECTRONICS, INC.,
Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a tying arrangement exists where the purchaser already owns the alleged tying product and the defendant does not, expressly or impliedly, condition the sale of the tying product on the purchase of the tied product or withhold, or threaten to withhold, the tying product unless the purchaser also purchases the tied product.

2. Whether the Appellate Court, having determined that plaintiff "failed to produce admissible evidence sufficient to support a rational jury determination of tortious interference with businesses" (51a) erred in ordering that JNOV be entered for defendant.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
I. Proceedings Below	1
A. The Claims Asserted in the Complaint	1
B. Proceedings in the Trial Court	2
C. The Appeal	3
II. THY's Petition For Certiorari	5
A. Petitioner's Question Presented on the Tying Claim	5
B. Petitioner's Question Presented on the Tort Claim	6
III. Statement of Facts	7
A. The Allegedly Wrongful Conduct	7
B. The Product and Geographic Markets for EKG and Stress Equipment	9
C. The Product and Geographic Markets for Recording Paper	11
REASONS FOR DENYING THE WRIT	12
SUMMARY OF ARGUMENT	12
I. Reasons for Denying Review of the Tying Claim	14
A. The Appellate Court Decision Does Not Conflict With Any Decision of this Court or any Other Appellate Court	14

B. Review of the Question Presented Cannot Alter the Judgment 17

1. *Per Se* Rule 17

2. Rule of Reason 18

C. This Case Bears No Similarity to *Image Technical Service* 19

II. Reasons for Denying Review of the Tort Claim 20

A. THY Did Not Raise the "New Trial" Issue Below 20

B. The Question Presented on the Tort Claim is of No General Significance .. 21

C. The Evidence Was Insufficient Under Florida Law to Establish Tortious Interference 22

1. JNOV is Required Even if the Hearsay Testimony is Considered 22

2. JNOV is Even More Clearly Mandated When the Hearsay Evidence is Excluded ... 24

CONCLUSION 25

TABLE OF AUTHORITIES

Cases	PAGE
Advance Business Systems & Supply Co. v. SCM Corp., 415 F.2d 55 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970)	16
Aldon Industries, Inc. v. Don Myers & Associates, Inc., 517 F.2d 188 (5th Cir. 1975)	23, 24
Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486 (11th Cir. 1985), *cert. denied*, 475 U.S. 1107 (1986)	15, 17
Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981)	23
Castle v. Sangamo Weston, Inc., 837 F.2d 1556 (11th Cir. 1988)	21
Construction Aggregate Transport, Inc. v. Florida Rock Industries, Inc., 710 F.2d 752 (11th Cir. 1983)	18
Deas v. Paccar, Inc., 775 F.2d 1498 (11th Cir. 1985), *cert. denied*, 475 U.S. 1129 (1986)	25
E.E.O.C. v. Federal Labor Relations Authority, 476 U.S. 19 (1986)	21
Ellis v. Dixon, 349 U.S. 458 (1955)	21
Heatransfer Corp. v. Volkswagenswerk A.G., 553 F.2d 964 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978)	16
Holley v. Seminole County School Dist., 763 F.2d 399 (11th Cir. 1985)	20
Image Technical Service, Inc. v. Eastman Kodak Co., 903 F.2d 612 (9th Cir. 1990), *cert. granted*, 111 S.Ct. 2823 (June 17, 1991)	13, 14, 19, 20, 26
Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2 (1984)	5, 15, 16, 17, 18

L.A. Draper & Son v. Wheelabrator-Frye, Inc., 735 F.2d 414 (11th Cir. 1984) 17

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McGahee v. Northern Propane Gas Co., 858 F.2d 1487 (11th Cir. 1988), *cert. denied*, 490 U.S. 1084 (1989) 18

Montgomery Ward & Co. v. Duncan, 311 U.S. 243 (1940) 25

Northern Pacific Railway Co. v. United States, 356 U.S. 1 (1958) 15, 16

Stanley Educational Methods, Inc. v. The Becker C.P.A. Review Course, Inc., 539 F.2d 393 (5th Cir. 1976) 20

Union Carbide Corp. v. Tarancon Corp., 682 F. Supp. 535 (N.D. Ga. 1988) 23

United States v. Loew's, Inc., 371 U.S. 38 (1962) .. 16

United States v. Philadelphia National Bank, 374 U.S. 321 (1963) 10

Statutes

15 U.S.C. §1 2

15 U.S.C. §2 2

Other Authorities

Moore's Fed. Prac., 2d Ed. §50.03(2) 25

R. Stern, E. Gressman, S. Shapiro, *Supreme Court Practice* (6th ed. 1986) 17

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

I. Proceedings Below

A. The Claims Asserted in the Complaint

Petitioner, T. Harris Young & Associates, Inc. ("THY"), is a distributor of heat sensitive recording paper which is used in electrocardiograph ("EKG") and stress testing machines. THY distributes such paper to medical clinics, physicians, and hospitals, in a nine state region in the Southeastern United States.[1] (31a)

[1] THY does business in Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Virginia and Tennessee. (31a)

Respondent, Marquette Electronics, Inc. ("Marquette"), is a Wisconsin manufacturer of EKG and stress testing equipment. Marquette also produces and distributes recording paper for use in its medical equipment. (31a)

In 1987, THY filed suit claiming that Marquette 1) tied recording paper (tied product) to EKG and stress testing equipment (tying products) in violation of §1 of the Sherman Act (15 U.S.C. §1); 2) monopolized an alleged relevant market for recording paper sold to general hospitals with 200 or more beds located in THY's nine state region in violation of §2 of the Sherman Act (15 U.S.C. §2); and 3) tortiously interfered with THY's business relations under state law. (30a)

B. Proceedings in the Trial Court

The jury returned a verdict for THY on all three claims. The District Court entered judgment for THY on the tort claim, but it granted Marquette's motion for JNOV on the tying and monopolization claims. (12a, 14a, 26a)

With regard to the tying claim, the District Court held that proof of market power over the tying product was a requisite element of a *per se* violation. (23a, 27a) Because THY had failed to define the markets for EKG and stress testing equipment or prove that Marquette enjoyed market power in such markets, the District Court held that no *per se* illegal tying claim had been proved. (23a)

With regard to the rule of reason, the District Court held that THY had failed to define a market for the tied product, which THY alleged to be recording paper sold to 200+ bed general hospitals located in THY's nine state region. (18a-21a) Because no market for recording paper had been defined, the District Court held that there was no way to determine whether an unreasonable effect on

competition within that market had occurred. (23a) Accordingly, the District Court held that THY failed to prove a rule of reason tying violation and entered JNOV for Marquette on the tying claim. (23a)

As to the monopolization claim, the District Court held that because THY failed to define a relevant market for recording paper, the monopolization claim must fail. (18a-21a) Accordingly, the District Court entered JNOV for Marquette on this claim, too. (23a-24a)

C. The Appeal

THY appealed the entry of JNOV for Marquette on the tying and monopolization claims. Marquette cross appealed from the denial of its motion for JNOV on the tort claim.

The Appellate Court rejected THY's tying claim on even more fundamental grounds than had the trial court. The Appellate Court held that for a tying arrangement to exist, a seller must condition the sale of the tying product on the purchase of the tied product or, stated differently, "withhold product A unless the buyer also selects product B". (36a, 37a) Contrary to THY's repeated assertion (Pet. i,1,7,8,9,10), the Appellate Court did not hold that the conditioning or withholding of the tying product had to be express, rather than implied.

The Appellate Court then noted that THY had not even *alleged*, much less proved, that Marquette withheld, or threatened to withhold, EKG or stress testing equipment from any purchaser unless the purchaser also bought Marquette recording paper. (39a)[2] The Appellate Court there-

[2] THY claims that the Appellate Court was mistaken in stating that it did not even allege that Marquette withheld or threatened

(Footnote continued on following page)

fore held that THY had failed to prove the existence of a tying arrangement and that judgment for Marquette had been properly entered.

As to the monopolization claim, the Appellate Court held that the relevant product market for recording paper could not, as THY had argued, be restricted to one class of customer—i.e., 200+ bed general hospitals. (41a-45a) The Appellate Court also rejected THY's contention that the relevant geographic market for recording paper could be limited to THY's nine state region. (40a-41a) Specifically, the Appellate Court held:

> THY presented no evidence that could support an inference that consumers within the nine state area could not turn to outside sellers if the prices increased within the nine state area. In fact, the evidence indicated that consumers could and did turn to outside suppliers . . . Moreover, 6 of the 13 suppliers of Marquette or Marquette compatible paper to customers in the nine state area were from outside the southeast area. (41a)

The Court, therefore, affirmed the grant of JNOV for Marquette on the monopolization claim. (41a, 44a-45a)

As to the tort claim, the Appellate Court reversed the judgment in THY's favor and held that JNOV should have been entered for Marquette on that claim, too. The Appellate Court noted that even though THY asserted

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[2] *continued*

to withhold EKG or stress testing equipment unless the purchaser also bought Marquette recording paper. (Pet. 7, at n. 5) THY then quotes from its complaint, but the quoted material does not even come close to "alleging" that Marquette withheld, or threatened to withhold, equipment from any purchaser who did not also buy recording paper. The quoted material merely states that Marquette threatened to void warranties on equipment which the purchaser *already* owned.

"extensive region-wide interference" with its business (45a), it attempted to prove tortious conduct "at only a small number of hospitals". (46a) The Court then held that *all* of the evidence of the supposedly tortious statements made at those hospitals was inadmissible hearsay and should have been excluded at trial. (45a-53a)

Contrary to THY's assertions (Pet. i,10,14,15), the Appellate Court did not re-weigh any evidence or assess the credibility of any witness. Rather, the Appellate Court held 1) that even though THY had "produced reams of trial transcripts and evidence" (51a), it had "failed to produce admissible evidence sufficient to support a rational jury determination of tortious interference with business" (51a) and 2) that the District Court erred in denying Marquette's motion for JNOV on the tort claim. (51a-52a)

II. THY's Petition For Certiorari

THY asks this Court to review two issues. The first relates to the tying claim and the second relates to the tort claim. THY does not seek review of the entry of JNOV for Marquette on the monopolization claim.

A. Petitioner's Question Presented on the Tying Claim

THY asks this Court to review whether it proved the existence of a tying arrangement. According to THY, the Appellate Court's ruling that a tie does not exist unless defendant withholds, or threatens to withhold, the tying product conflicts with *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984) and numerous Circuit Court of Appeals decisions.

Significantly, THY does not seek review of the Appellate Court holding that THY failed to define relevant markets for the tying products (EKG and stress testing

equipment) and failed to prove that Marquette possessed market power in those markets. Nor does THY seek review of the Appellate Court holding that it failed to define a relevant market for the tied product (recording paper) or prove an unreasonable effect on competition in that market. (19a-21a, 23a, 39a-45a)

B. Petitioner's Question Presented on the Tort Claim

THY requests the exercise of this Court's supervisory power to review the Appellate Court's holding that JNOV should have entered for Marquette on the tort claim. According to THY, the hearsay rulings (which THY does not here challenge) could not justify the entry of JNOV. Furthermore, THY claims the Appellate Court applied an improper standard of appellate review in holding that it "failed to produce admissible evidence sufficient to support a rational jury determination of tortious interference". (Pet. 51a) Thus, THY claims the Appellate Court should have ordered a new trial, rather than granting JNOV for Marquette.

In making this argument, THY fails to mention that it neither raised nor preserved this issue below. Indeed, in contending that it argued on appeal that the erroneous admission of the hearsay evidence only justified a new trial and not JNOV, THY cites only to its "Supplement" to its petition for rehearing en banc (Pet. 8; *see*, 54a)[3] The

[3] THY's petition for rehearing was due on June 11, 1991, and was timely filed. Ten days later, on June 21, 1991, THY filed a pleading captioned "Supplement to Suggestion of Rehearing *En Banc* and Petition for Rehearing" without seeking leave of court to do so. (54a) When Marquette objected to the filing of this pleading, THY moved, on June 27, 1991, for leave of court to file it,

(Footnote continued on following page)

"new trial" issue which THY argues to this Court was not raised during the main appeal to the Eleventh Circuit. Thus, the issue was not preserved in the Appellate Court and cannot be asserted here.

III. Statement of Facts

A. The Allegedly Wrongful Conduct

It was THY's theory that Marquette told all of the 200+ bed general hospitals in its nine state region that non-Marquette paper would damage Marquette equipment and that Marquette warranties and service contracts would be voided if the customer bought non-Marquette paper. On that basis, THY claimed that Marquette had committed "an extensive region wide" tort and tied recording paper to EKG and stress testing equipment. (31a-32a; 45a)

At trial, however, THY identified only eight hospitals where this allegedly wrongful conduct supposedly took place. For six of these hospitals, the only evidence of any allegedly wrongful conduct was in the testimony of Cynthia Cherry and William Lofdahl. (46a)[4] The Appellate

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[3] *continued*
(ra1; "ra__" references are to respondent's appendix) which Marquette opposed. (ra5) On August 30, 1991, the Appellate Court denied THY's Petition for Rehearing and Suggestion of Rehearing *En Banc*. (56a) On September 10, 1991, the Appellate Court denied the "Supplement to Suggestion of Rehearing *En Banc* and Petition for Rehearing." (ra12).

[4] Ms. Cherry testified as to events at 1) the V.A. hospital in Ashville, North Carolina (46a-47a); 2) the Myrtle Beach Air Base Hospital (47a, n. 21); 3) East Jefferson Hospital (48a, n. 21); 4) Betsy Johnson Hospital (id); and 5) Trident Regional Medical Center (id). Mr. Lofdahl also testified as to events at the V.A. Hospital in Ashville and added to the list a sixth hospital, Davie County Hospital in North Carolina. (48a)

Court, however, held their testimony to be inadmissible hearsay. (46a-53a)[5] THY does not seek review of that evidentiary ruling.

The seventh identified hospital was Wake Medical Center. Michael Marrow testified as to events at that hospital. (49a) The Appellate Court held his testimony, too, to be inadmissible hearsay. (id)

The eighth, and final, hospital was North Broward Medical Center. The testimony as to the events at that hospital came from Sharon Popeil. Her testimony was not hearsay, but as the Appellate Court held, it did not support THY's factual contentions. Ms. Popeil testified that she had independently concluded that THY's paper "was causing our machine to break down". (52a, n. 24) She further testified that after switching to Marquette paper, the problems with the machine stopped. (id)

The only other evidence of any allegedly wrongful conduct came from Mr. David Taylor.[6] It is Mr. Taylor's tes-

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[5] With regard to the events at the V.A. Hospital in Ashville, THY also introduced the testimony of Sally Morrell. Her testimony, too, was held to be hearsay. (48a, n. 22)

[6] THY also cites the testimony of Mr. Charles Brinkley. (Pet. 16, n. 8) He is the gentleman from the V.A. Hospital whose out of court declaration Cynthia Cherry related in her hearsay testimony. Ms. Cherry testified that Brinkley told her that a Marquette employee had told him that Marquette equipment would be damaged and the "warranty would be completely voided if the hospital used anything but Marquette brand paper". (46a) When Mr. Brinkley took the stand to speak for himself, however, he testified to no such thing. Rather, Mr. Brinkley testified that all he was told by Marquette was that "some types of paper had caused problems with printheads and that warranty coverage would not be provided where such problems occurred". (51a, n. 24) He also testified that Marquette employees told him "it might be possible to use all different types of papers". (id) Not even THY contends that such statements are wrongful. Incredibly, THY continues to rely on Mr. Brinkley's testimony. (Pet. 16)

timony on which THY principally relies. (Pet. 15) THY claims that Taylor's testimony is "direct evidence of Marquette's practice of tortious interference" and that the Appellate Court "improperly weighed" his testimony and assessed his credibility. (id)

Taylor testified that a Marquette employee, Mr. Terry Johnson, told him that he (Johnson) told Marquette salesmen to tell customers that their warranty or service contracts would be "no good" if the customer used non-Marquette paper. (52a, n. 24) As the Appellate Court points out, however, Taylor admitted that he had no idea whether any Marquette salesman actually made this statement to any hospital. (id) Furthermore, as the Appellate Court noted, Taylor contradicted his own testimony when he testified that Johnson only told him that he (Johnson) told Marquette salesmen to tell the customers that if a printhead burned out and the customer was using non-Marquette paper, then the printhead would not be replaced under the warranty. (52a-53a, n. 24)

Other than the inadmissible hearsay evidence discussed above, THY presented *no* evidence that any wrongful statement was actually made at any hospital.

B. The Product and Geographic Markets for EKG and Stress Equipment

Marquette is one of nine manufacturers of EKG machines and one of eighteen manufacturers of stress testing equipment in the United States. (30a-31a) Nevertheless, petitioner asserts that Marquette enjoys "a dominant position in both the markets for EKG and stress testing equipment". (Pet. 2) The District Court, however, rejected this contention (23a, 27a) and THY cites only the flawed and twice rejected (18a-21a; 39a-45a) study of its expert, Prof. Rubin, in support of it.

Prof. Rubin merely assumed that EKG machines competed only with EKG machines and that stress testing equipment competed only with stress testing equipment. He admitted he did not study what other products, procedures, or equipment were reasonably interchangeable with these machines or whether close substitutes existed for them. Nor did he study the cross-elasticity of demand between these machines and other products. (R16-593-94)

Prof. Rubin's market investigation consisted of a telephone survey of 200+ bed general hospitals in THY's nine state region. (Px125, 1-4) All other equipment buyers, such as specialty hospitals, clinics, physicians, and small hospitals, were excluded from the survey. (R18-196; R22-1405-06)[7] Furthermore, although the survey was limited to THY's nine state region, there was no proof, or even the contention, that equipment purchasers in that region could not look to sellers outside of the region for their supply of EKG or stress testing equipment.[8] In fact, Marquette is located in Milwaukee and the other equipment manufacturers are also located outside of the Southeast. (Dx175; Dx132) Rubin nonetheless restricted the survey

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[7] Rubin's explanation for excluding all buyers except 200+ bed general hospitals from the market survey was that the plaintiff had indicated to him that 200+ bed general hospitals were the appropriate market. (R16-510)

[8] If buyers in the Southeastern region can realistically and practically look to sellers of equipment located outside of the Southeast then the Southeast is not a relevant geographic market and a survey which only includes buyers within that area has no antitrust significance. *United States v. Philadelphia National Bank*, 374 U.S. 321, 359 (1963).

to the Southeast because that is the territory in which THY did business. (R16-530-31, 550-51, 555-51)[9]

On the basis of this survey, petitioner claims that 47% and 41% of the large hospitals used Marquette EKG and stress testing equipment, respectively, as their "primary" brand of equipment. (Pet. 3) The data behind this contention comes from asking 200+ bed general hospitals in the nine state region: "what is your primary brand of EKG [or stress testing] equipment?" (Px125, app. p. 2) The word "primary" was not defined for the interviewee and Rubin admitted that a hospital with seven machines, two of which were Marquette and five of which were manufactured by five other companies, would answer that its "primary" brand of machines was Marquette. (R16-557-66; R25-447-78) Thus, Rubin was forced to admit that from his survey data, he could not compute the percentage of the machine population that was Marquette. (R-25-477-78; R16-522-23, 551-52, 557-58, 560, 589-90) Nor did Rubin know what Marquette's current or historic market share of annual machine sales was. (Px125)

C. The Product and Geographic Markets for Recording Paper

Prof. Rubin also claimed that the recording paper product market should be limited to 200+ bed general hospitals. (42a-43a) This claim was made even though THY and Marquette sold identical recording paper at the same prices to clinics, doctors, smaller hospitals and specialty

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[9] When asked if he had determined whether THY's territory was "an area of effective competition for equipment", Rubin could only answer that "this was the market or territory that [THY] had been assigned". (R16-550) Indeed, he stated that the geographic scope of the effective competition is a "moot point". (Px129, p.23)

hospitals. (34a, 43a, n. 16; R18-196; R22-13, 14-15) Both lower courts held that limiting the recording paper market to only 200+ bed general hospitals was erroneous as a matter of law. (41a-45a; 18a-21a)

As to the geographic market for recording paper, THY again sought to limit the scope to its nine state Southeastern region. The uncontradicted evidence, however, was that prices of recording paper inside and outside the nine state territory were virtually identical. (33a; 41a) All suppliers relied on UPS or similar common carriers to deliver paper and the difference in transportation cost between sellers inside and outside of the nine state region was a trivial percentage of the total cost of the paper. (id) As a result, six out of thirteen sellers of recording paper in the Southeast, including Marquette, were from outside that purportedly relevant geographic market. (33a-34a, n. 7) Thus, the Appellate Court held that "THY presented no evidence that could support an inference that consumers within the nine-state area could not turn to outside sellers if the prices increased within the nine-state area." (41a)

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

In order to demonstrate the existence of a tying arrangement, plaintiff must prove that defendant agreed to sell the tying product only on the condition that the purchaser also purchases the tied product. Here, THY neither alleged nor proved that Marquette ever withheld, threatened to withhold, or conditioned the sale of equipment on the purchase of recording paper. Indeed, the purchasers of paper already owned equipment at the time of the alleged tying conduct. The holding below, that under these

circumstances no tie exists, is not in conflict with any decision of any Court. No case has ever held tying exists when defendant has neither expressly nor impliedly withheld the tying product.

Even if this Court were to review and reverse the holding that no tie was shown to exist, judgment would still necessarily enter for Marquette on the tying claim. This is because the lower courts have held, and THY does not here challenge, that THY failed to define the markets for the tying and tied products; and, failed to prove Marquette possessed market power in the tying product markets or unreasonably injured competition in the tied product market. Accordingly, THY cannot prevail on its tying claim, as a matter of law, under either the *per se* rule or the rule of reason. Any decision on the tying question presented for review would, therefore, be advisory in nature.

Contrary to THY's assertion, this case bears no similarity to any issue which will be reviewed in *Image Technical Service*. In that case, spare parts are alleged to be the tying product and the issue for review is whether a manufacturer with no market power over equipment can, nonetheless, have meaningful market power over spare parts for that equipment. That issue is totally unrelated to the tying issue presented by petitioner.

THY claims that the exercise of this Court's supervisory power is required because the Appellate Court granted JNOV on the state law tort claim instead of ordering a new trial. Review of the disposition of the tort claim is inappropriate for three reasons. First, THY failed to raise the issue below of whether Marquette was only entitled to a new trial, as opposed to JNOV, and it may not properly raise that issue now. Secondly, the question of whether the facts in this case are sufficient to allow a reasonable

juror to return a verdict for THY is of no general legal significance and will be of consequence only to the immediate parties hereto. Thirdly, it is clear that under the substantive tort law of Florida, THY's evidence, both admissible and inadmissible, is insufficient to create a jury question as to whether the alleged tort was proved. JNOV for Marquette was, therefore, not only proper, but required.

I. Reasons For Denying Review of the Tying Claim

THY argues that review of the Appellate Court's holding that no tie was shown to exist is appropriate for two reasons. First, THY claims that the decision conflicts with numerous decisions of this Court and other appellate courts. Secondly, THY claims this case is similar to *Image Technical Service, Inc. v. Eastman Kodak Co.*, 903 F.2d 612 (9th Cir. 1990), *cert. granted*, 111 S. Ct. 2823 (June 17, 1991).

These contentions are without merit. As Marquette demonstrates below, (1) the decision of the Appellate Court is not even arguably in conflict with the decision of any court; (2) even if the existence of a tie were reviewed and reversed, other holdings below would preclude THY from recovering on the tying claim, and any decision by this Court on the tying question presented for review would be advisory in nature; and (3) contrary to THY's contention, this case bears no similarity whatsoever to *Image Technical Service*.

A. The Appellate Court Decision Does Not Conflict With Any Decision of this Court or any Other Appellate Court

Tying occurs when a seller refuses to sell the tying product (here equipment) except on the condition that the

customer also purchases the tied product (here paper). If the buyer "is free to take either product by itself there is no tying problem." *Jefferson Parish*, 466 U.S. 2, 11, n. 17 (1984). As this Court stated in *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958), "[a] tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchase a different (or tied) product." *Accord*, *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1492 (11th Cir. 1985), *cert. denied*, 475 U.S. 1107 (1986). (*see*, 37a)

In this case, THY *did not even allege* that Marquette refused to sell EKG or stress testing equipment unless the purchaser also bought recording paper. Moreover, Mr. T. Harris Young, himself, admitted he was "not aware . . . of any instances in which Marquette made the purchase of recording paper a condition of purchasing any equipment". (R19-230-31)

To avoid the consequences of this gaping hole in its legal theory, THY argues that Marquette coerced hospitals to purchase its recording paper by threatening to cancel service contracts or warranties and that this coercion is an implied or subtle form of "conditioning" or withholding of the tying products. (Pet. 10-11) This argument is made even though the alleged coercion is totally unrelated to any withholding of equipment from the purchaser (who already owned the equipment) or the conditioning of any sale of equipment on the purchase of recording paper.

No case has ever held that the coercion alone, unrelated to the withholding, the threat to withhold, or the conditional sale of the tying product, constitutes tying.[10] It is,

[10] As stated by the Appellate Court: "All the tying cases . . . concern factual situations where the defendant has allegedly withheld, or threatened to withhold, [the tying] product". (37a, n. 10)

therefore, not surprising that the cases cited by THY as being in conflict with the opinion below do not even arguably support its contention. In *Jefferson Parish*, the defendant hospitals would not provide surgical facilities unless the patients agreed to purchase anesthesiology services from the hospital's designee. In *Northern Pacific Railway*, the defendant would not sell or lease land unless the grantee or lessee agreed to purchase needed transportation services from defendant. In *United States v. Loew's, Inc.*, 371 U.S. 38 (1962), the defendant refused to license or sell feature films unless the purchaser also licensed or purchased one or more unwanted and inferior films. In *Advance Business Systems & Supply Co. v. SCM Corp.*, 415 F.2d 55, 64 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970), the defendant threatened to cancel copier leases, thereby withholding and taking back the tying product, unless the lessees agreed to purchase defendant's copier supplies. (37a, n. 10) In *Heatransfer Corp. v. Volkswagenswerk A.G.*, 553 F.2d 964 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978), the defendant refused to sell automobiles to its dealers unless they agreed to purchase automobile air conditioners.

None of these cases are in conflict with the decision below. In all of them the defendant declined to sell and withheld the tying product unless the purchaser also agreed to buy the tied product. Here, the purchasers already owned the equipment when the allegedly wrongful conduct took place and THY neither alleged nor proved that Marquette ever withheld, threatened to withhold, or conditioned the sale of any equipment on the purchase of recording paper.

B. Review of the Question Presented Cannot Alter the Judgment

Certiorari should generally be denied where review will be irrelevant to the outcome of the case or where the case might be decided on other grounds. R. Stern, E. Gressman, S. Shapiro, *Supreme Court Practice*, 201 (6th ed. 1986). Here, THY asks this Court to review the question of whether THY demonstrated the existence of a tying arrangement. Even if THY were to prevail on that point, however, judgment for Marquette on the tying claim would still be mandatory. This is because the lower courts have already held in this case that THY failed to define the relevant markets for either the tying or the tied products, and THY does not seek review of those holdings. Without reversing those holdings, however, THY's tying claim necessarily fails under either the *per se* rule or the rule of reason and any decision by this Court on the tying question presented for review would be advisory in nature.

1. *Per Se* Rule

An element of a *per se* illegal tying violation is "that the seller have sufficient market power in the tying product market to force the buyer to accept the tied product". *Amey*, 758 F.2d at 1503; *Jefferson Parish*, 466 U.S. at 15 (seller must have power over the tying product—"usually called market power"—to force the purchaser to take the tied product).

Market power does not exist in the abstract. It can be measured only within an "area of effective competition" which is delineated by the relevant market analysis. *L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F.2d 414, 422-23 (11th Cir. 1984) (Evaluation of market power . . .

[is] rendered impossible in the absence of proof regarding the economic significance (or relevance) of the market"); *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1505 (11th Cir. 1988), *cert. denied*, 490 U.S. 1084 (1989) (to determine market power "a court examines the relevant market").

In *Jefferson Parish*, this Court held that plaintiff had failed to prove market power over the tying product precisely because he incorrectly defined the relevant geographic market. Using the correct geographic market definition, this Court held that the defendant had only a 30% market share, which was held insufficient, as a matter of law, to allow an inference of market power. 466 U.S. at 7-8, 26.

Here, the lower courts have held that THY failed to define the relevant product market for EKG or stress testing equipment; failed to define a relevant geographic market for such equipment; and, improperly attempted to measure Marquette's market power over such equipment amongst only one class of customer—i.e. 200+ bed general hospitals. THY does not challenge or seek review of these holdings. Accordingly, a *per se* tying violation could not be found to exist, regardless of how the tying question presented for review is decided.

2. Rule of Reason

In order to prove a rule of reason tying violation, plaintiff must define the product and geographic dimensions of the tied product market and prove that competition was unreasonably restrained within it. *See, e.g., Jefferson Parish*, 466 U.S. at 29; *Construction Aggregate Transport, Inc. v. Florida Rock Industries, Inc.*, 710 F.2d 752, 772 (11th Cir. 1983).

The courts below have already held that THY failed, as a matter of law, to properly define either the product or the geographic markets for recording paper. Again, THY neither challenges nor seeks review of those holdings. As a result, THY cannot possibly demonstrate a rule of reason tying violation in this Court.

The judgment of the Appellate Court on the tying claim cannot be reversed unless this Court were to review holdings that petitioner neither challenges nor asks this Court to review. Petitioner's request for review of the question of whether a tie was shown to exist is, therefore, a request for an advisory opinion that will not alter the judgment regardless of how the question presented is decided.

C. This Case Bears No Similarity to *Image Technical Service*

THY argues that this case is similar to *Image Technical Service, Inc. v. Eastman Kodak Co.*, 903 F.2d 612 (9th Cir. 1990), *cert. granted*, 111 S. Ct. 2823 (June 17, 1991), and asks this Court to review the decision below "alongside *Kodak*". (Pet. 9, 11-12) THY is mistaken. The issues it presents for review bear no similarity whatsoever to the issue which this Court has agreed to review in *Kodak*.

In *Kodak*, the defendant, a manufacturer of copiers, sells replacement parts to customers who purchase its repair service or who service their machines themselves. Defendant refuses, however, to sell replacement parts to any customer who purchases repair service from a competing service company. That refusal is the alleged tie. The question presented by THY—whether a tie exists even though defendant does not withhold, or threaten to withhold, the tying product—is not even arguably raised in *Kodak*.

The issue which this Court granted certiorari to review in *Kodak* is whether an equipment manufacturer that lacks market power in the equipment market can, nonetheless, enjoy meaningful market power over replacement parts for that equipment. Regardless of how that issue is resolved, it will have no impact on THY's claim. Here, THY asserts that Marquette enjoys, and misused, market power in an equipment market—not a subsidiary market for the replacement parts for such equipment.

II. Reasons for Denying Review of the Tort Claim

THY requests certiorari on whether a new trial, as opposed to JNOV, should have been granted on its state law claim. As set forth below, there are three reasons for denying the writ. First, THY did not raise this "new trial" issue in the Appellate Court. Second, assuming THY's argument had any merit, its consideration would involve only the facts of this case and would be of significance only to the parties hereto. Third, THY's non-hearsay evidence, and even its hearsay evidence, was clearly insufficient to create a jury issue as to whether the elements of the state law tort were proved.

A. THY Did Not Raise The "New Trial" Issue Below

THY did not raise the question of whether a new trial, as opposed to JNOV, was appropriate until it filed its "Supplement to Suggestion of Rehearing En Banc and Petition for Rehearing". (*see*, text at n. 3, *supra.*) By failing to raise this issue during the main appeal, THY waived it. *Holley v. Seminole County School Dist.*, 763 F.2d 399, 400-401 (11th Cir. 1985) (Court "will not entertain . . . questions presented for the first time in petition for rehearing"); *Stanley Educational Methods, Inc.*

v. The Becker C.P.A. Review Course, Inc., 539 F.2d 393, 394 (5th Cir. 1976) (issue raised up for the first time on petition for rehearing will ordinarily not be considered).

Issues which are not preserved in the Appellate Court are not the proper subject of a writ of certiorari. *Ellis v. Dixon*, 349 U.S. 458, 460 (1955) (writ of certiorari dismissed as improvidently granted: "The question of whether the regulations are unconstitutionally vague was not raised below, and hence is not open here"); *E.E.O.C. v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986) ("Our normal practice . . . is to refrain from addressing issues not raised in the Court of Appeals"). Because THY failed to preserve the "new trial" issue below, it is not suitable for a writ of certiorari now.

B. The Question Presented on the Tort Claim is of No General Significance

THY claims that the Appellate Court applied an incorrect standard of appellate review. (Pet. i, 14) The Appellate Court, however, set forth the legally correct standard of appellate review and THY does not claim that the Court misstated the law in any respect.[11] What THY

[11] The Appellate Court stated that "a motion for JNOV tests the sufficiency of the evidence supporting a jury verdict". (35a) Quoting from *Castle v. Sangamo Weston, Inc.*, 837 F.2d 1556, 1558 (11th Cir. 1988), the Court further held that the evidence must be considered "in the light and with all reasonable inferences most favorable" to THY; that a motion for JNOV should be granted only if reasonable people could not arrive at a contrary verdict; and, that where there is substantial conflicting evidence as to which reasonable people might differ, JNOV should be denied. (36a) Finally, the Court held that evidentiary rulings are discretionary and will not be disturbed absent a clear showing of abuse of discretion. (36a)

actually objects to is not the standard of review employed by the Appellate Court, but the manner in which the facts of this particular case were applied to that undisputed legal standard.

The manner in which the facts of this particular case were applied to an admittedly correct legal standard is not, however, of any general legal significance. It is a purely fact-bound issue which will only resolve this particular dispute and be of consequence only to the immediate parties. Indeed, THY does not even argue to the contrary. Accordingly, THY's petition for certiorari on the state law tort claim should be denied.

C. The Evidence Was Insufficient Under Florida Law to Establish Tortious Interference

The question of whether JNOV was proper on the state law claim depends on the elements of the alleged tort under Florida law and "the sufficiency of the evidence" to prove those elements. (35a, 51a) If no reasonable juror could conclude that THY proved the requisite elements of the region-wide tort which it alleged, then JNOV for Marquette was proper and the exercise of this Court's supervisory power is unnecessary. As explained below, even if THY's hearsay evidence were admissible (which THY does not even contend), no reasonable juror could conclude that THY proved its claim. When the hearsay evidence is properly excluded, the propriety of JNOV for Marquette becomes virtually indisputable.

1. JNOV Is Required Even If the Hearsay Testimony Is Considered

Florida law does not allow region-wide tortious interference to be inferred from limited proof of conduct pertain-

ing to only a small number of customers. For example, in *Aldon Industries, Inc. v. Don Myers & Associates, Inc.*, 517 F.2d 188 (5th Cir. 1975),[12] plaintiff claimed that its ability to sell carpet to 67 school boards in Florida was destroyed by defendant's tortious conduct. Plaintiff presented evidence, however, of only two instances where a school board had declined to do business with it on account of defendant's wrongful conduct. The Fifth Circuit, applying Florida law, reversed a judgment for plaintiff, and specifically held that the evidence was insufficient, as a matter of law, to permit the jury to infer the existence of a statewide tort:

> Since [plaintiff] sought recovery for damages resulting from statewide loss of sales, it follows that it must prove statewide rather than localized injury. Statewide injury to its reputation and consequent loss of sales cannot be inferred from [plaintiff's] removal from the bidding lists of two out of a total of sixty-seven county school boards.

517 F.2d at 191.

Consistent with *Aldon*, the Florida Court of Appeals held in *Lake Hospital, Inc. v. Silversmith*, 551 So. 2d 538 (Fla. App. 1989), that defendant was entitled to a directed verdict on a tortious interference claim because plaintiff did not prove defendant "specifically interfered with particular relationships." *Id.* at 545. *See also, Union Carbide Corp. v. Tarancon Corp.*, 682 F.Supp. 535, 543 (N.D. Ga. 1988) (defendant granted summary judgment on tortious interference claim because plaintiff did not prove

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[12] The Eleventh Circuit Court of Appeals has adopted the law of the Fifth Circuit Court of Appeals prior to October 1, 1981, as controlling precedent. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

defendant "actually contacted [plaintiff's] current or prospective customers").

In the current case, THY, like the plaintiff in *Aldon*, has asserted region-wide tortious conduct. As the Appellate Court held, however, THY "only introduced evidence regarding [tortious] statements by Marquette employees at [seven] hospitals". (Pet. 46a; *see also* 49a, 52a, n.24) Thus, the legal deficiency in THY's proof is identical to the deficiency found in *Aldon*. Just as proof pertaining to only two customers was insufficient to create a jury issue as to the existence of a statewide tort in *Aldon*, proof pertaining to only seven customers is insufficient to create a jury issue as to the existence of a nine state region-wide tort in this case. Thus, even if THY's hearsay evidence is considered, under Florida substantive law, a jury would not be allowed to infer the existence of a region-wide tort from the limited evidence submitted by THY, and JNOV for Marquette was clearly required.

2. JNOV is Even More Clearly Mandated When the Hearsay Evidence is Excluded

THY does not seek review of the hearsay rulings below. Once the hearsay evidence is properly excluded from consideration, Marquette's right to JNOV under Florida law becomes virtually indisputable. This is because the only remaining evidence of any allegedly tortious conduct is the testimony of David Taylor. As the Appellate Court held, that evidence is not "sufficient to support a rational jury determination of tortious interference with business" because Taylor admitted he had no knowledge of any particular tortious statement being made to any particular customer. (51a-52a, n.24)

Thus, if one looks only to the admissible evidence, no reasonable juror could ever believe that THY proved that Marquette "specifically interfered with particular relationships," as required by Florida law. *Lake Hospital*, 551 So. 2d at 545. As a result, the evidence was insufficient to support a jury verdict and the entry of JNOV for Marquette was required. (35a-36a)

None of the authorities cited by petitioner are inconsistent with the substantive law of Florida as discussed above. Indeed, THY's authorities are not even pertinent to the question of whether the evidence adduced at trial, admissible or inadmissible, was sufficient to support a jury verdict under controlling Florida law. Certainly, none of THY's authorities holds that an appellate court cannot reverse the denial of JNOV for a defendant where the proof at trial is legally insufficient to support a jury verdict.[13]

CONCLUSION

It is respectfully submitted that petitioner has wholly failed to sustain its burden of establishing that there are special or important reasons why a writ of certiorari should issue in this case. The tying decision below does not conflict with any decision of this Court or any other Court

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[13] THY cites *Deas v. Paccar, Inc.*, 775 F.2d 1498 (11th Cir. 1985), *cert. denied*, 475 U.S. 1129 (1986); *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243 (1940) and 5A, Moore's Fed. Prac., 2d ed. §50.03 (2) (Pet. 16). *Deas* merely holds that where the trial judge granted defendant a new trial, but that plaintiff requested JNOV be entered instead so that a prompt appeal could be taken, that the plaintiff had waived a new trial. *Montgomery Ward* merely holds that when a District Court grants JNOV, it should conditionally rule on the motion for a new trial. Moore's treatise merely states that JNOV should be decided as a matter of law, whereas a motion for a new trial is discretionary.

of Appeals. Even if the tying issue raised by THY were reviewed and reversed, judgment for respondent would nonetheless be mandatory, and, contrary to petitioner's contention, the issues here bear no similarity to issues raised in *Image Technical Service*. As to the tort claim, the issue presented by THY was neither raised nor preserved below; it is purely dependent on the facts of this case; is of no general significance; and, tests only the sufficiency of the evidence to support a pendant state law claim. The petition should, accordingly, be denied in all respects.

Respectfully submitted,

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APPENDIX

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-3252
No. 90-3364

T. HARRIS YOUNG & ASSOCIATES, INC.,
a Florida corporation,

Plaintiff-Appellant,
Cross-Appellee,

v.

MARQUETTE ELECTRONICS, INC.,
a Wisconsin corporation,

Defendant-Appellee,
Cross-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

MOTION FOR LEAVE TO FILE SUPPLEMENT TO SUGGESTION OF REHEARING EN BANC AND PETITION FOR REHEARING

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MOTION FOR LEAVE TO SUPPLEMENT SUGGESTION OF REHEARING EN BANC AND PETITION FOR REHEARING

T. Harris Young & Associates, Inc. moves the Court for leave to file the Supplement to its Suggestion of Rehearing En Banc and Petition for Rehearing of which a copy is in the addendum to this motion.

The proposed Supplement consists of one page and its inclusion with the Suggestion would not materially enlarge its length which has been allowed to be 20 pages. The purpose of the Supplement is, as it states, to bring the Court's attention that its ruling that inadmissable evidence was allowed by the district court could only support a ruling that there was judicial error which would warrant a new trial.

This motion is made in the interest of justice, and the same motion has not been previously made.

A copy of this motion has been served upon all counsel of record.

Respectfully submitted this 27th day of June, 1991.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail, this 27th day of June, 1991, to Paul E. Slater, Esquire, 55 West Monroe, Suite 3300, Chicago, Illinois 60603; Melvin S. Newman, Esquire, 222 S. Riverside Plaza, Suite 2700, Chicago, Illinois 60606; Davisson F. Dunlap, Esquire, and William D. Palmer, Esquire, Post Office Box 1171, Orlando, Florida, 32802.

Eli H. Subin

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-3252
No. 90-3364

T. HARRIS YOUNG & ASSOCIATES, INC.,
a Florida corporation,

Plaintiff-Appellant,
Cross-Appellee,

v.

MARQUETTE ELECTRONICS, INC.,
a Wisconsin corporation,

Defendant-Appellee,
Cross-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

MEMORANDUM OF MARQUETTE ELECTRONICS, INC. IN OPPOSITION TO MOTION FOR LEAVE TO FILE SUPPLEMENT TO SUGGESTION OF REHEARING EN BANC AND PETITION FOR REHEARING

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INC.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for the defendant-appellee, cross-appellant, Marquette Electronics, Inc., certifies that the following is a complete list of all persons and organizations having an interest in the outcome of this case as required by 11th Cir. R.28-2(b):

The Honorable Robert R. Merhige, Jr.,
United States District Judge for the
Eastern District of Virginia

T. Harris Young & Associates, Inc.

Marquette Electronics, Inc.

Marquette N. Ireland, Ltd.

Marquette Gas Analysis Corp.

Marquette Electronics GB, Ltd.

Marquette Espana S.A.

Marquette Electronics SARL

Marquette Electronics GMBH

Marquette Benelux

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Electronics, Inc.

On May 20, 1991 this court issued an opinion affirming the grant of Judgment NOV against plaintiff, T. Harris Young & Associates ("THY") on its Sherman Act claims and ordering that Judgment NOV be entered on THY's tortious interference with business relations claim. On May 28, 1991 THY filed a motion before this Court to expand the length of a petition for rehearing to twenty pages. The motion was unopposed by defendant Marquette Electronics, Inc. ("Marquette") and was granted by this Court. On June 5, 1991 THY timely filed its Suggestion of Rehearing En Banc and Petition for Rehearing ("Petition") which was twenty pages in length.

On June 21, 1991 THY submitted to this Court its "Supplement to Suggestion of Rehearing En Banc and Petition for Rehearing" ("Supplement"). The Supplement does not cite any authority which was not available at the time the petition for rehearing was due, which was on June 10, 1991. Indeed, the Supplement does not cite any authority dated after 1989. The Supplement raises a new argument not made in the Petition (and, in fact, not previously made on appeal).

On June 28, 1991 after being advised by the Clerk's Office that it would have to seek Leave of Court to file its Supplement, THY filed a Motion For Leave To File Supplement To Suggestion Of Rehearing En Banc and Petition For Rehearing. In its motion, THY offers no explanation as to 1) why its new argument was not included in the original Petition; 2) why it should be allowed to raise

new arguments after the time for filing its petition for rehearing has run; and 3) why it should be allowed to submit additional material exceeding the twenty page limit which it has been allowed.

Marquette respectfully suggests that the material in THY's supplement has not been timely filed by the June 10, 1991 due date and exceeds the twenty page limitation granted to THY. As THY has offered no explanation for why this material was not timely filed; included in the original petition; and was not set forth within the twenty page limitation, the motion for leave to file the Supplement should be denied.

Respectfully submitted this 1st day of July 1991.

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CERTIFICATE OF SERVICE

Paul E. Slater, an attorney, hereby certifies that he caused a true and correct copy of the above and foregoing **Memorandum of Marquette Electronics, Inc. In Opposition To Motion For Leave To File Supplement To Suggestion Of Rehearing En Banc and Petition For Rehearing** to be served upon

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by ECC Overnight Courier this 1st day of July, 1991.

_____

Paul E. Slater

[Filed with the U.S. Court of Appeals,
Eleventh Circuit on September 10, 1991)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 90-3252 and 90-3364

T. HARRIS YOUNG & ASSOCIATES, INC.,
a Florida corporation,

Plaintiff-Counter
Defendant-Appellant/
Cross-Appellee,

versus

MARQUETTE ELECTRONICS, INC.,
a Wisconsin corporation,

Defendant-Counterclaim-
Appellee/Cross-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida

O R D E R:

Cross-Appellee, T. Harris Young & Associates, Inc.'s supplement to suggestion of rehearing en banc and petition for rehearing is DENIED.

/s/ Joseph W. Hatchett
UNITED STATES CIRCUIT JUDGE

(3)

No. 91-679

FILED
DEC 6 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1991

T. HARRIS YOUNG & ASSOCIATES, INC.
Petitioner,

v.

MARQUETTE ELECTRONICS, INC.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

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October, 1991

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RULE 29.1 DISCLOSURE

The caption of the case in this Court contains the names of all parties to the appeal in the United States Court of Appeals for the Eleventh Circuit. The petitioner, T. Harris Young & Associates, Inc., has no parent companies, subsidiaries or affiliates. The following is a list of the parent companies, (except wholly owned subsidiaries), and affiliates of the respondent, Marquette Electronics, Inc. This representation is made pursuant to Rule 29.1 of this Court:

Marquette N. Ireland, Ltd.
Marquette Gas Analysis Corp.
Marquette Electronics GB, Ltd.
Marquette Espana S.A.
Marquette Electronics SARL
Marquette Electronics GMBH
Marquette Italia S.A.

TABLE OF CONTENTS

Page

RULE 29.1 DISCLOSURE i

TABLE OF AUTHORITIES v

SUPPLEMENTARY STATEMENT OF THE CASE 1

REPLY ARGUMENT 4

I. The Eleventh Circuit's Restrictive Re-Definition Of Tying Conflicts With the Language and Policy Of The Antitying Statute 4

II. There Was Ample "Non Hearsay" Evidence to Support The Jury's Verdict That Marquette Tortiously Interfered With Young's Business 9

CONCLUSION 10

APPENDIX 67a

PX 125, U.S. Testing Company Market Research, Inc. Report 67a

Page

Table 1, Responses to Question #1, "What Is your primary brand of EKG equipment?" 67a

Table 2, Responses to Question #2, "What is your primary brand of stress testing equipment?" 69a

Table 4, Question 1 and Question 2 Combined (63% of Respondents Have Some Form of Marquette Equipment) 71a

Testimony

David Taylor (R. 27-398 line 6 - 400 line 11) 72a

Charles Brinkley (R. 13-339-36-38) 74a

TABLE OF AUTHORITIES

CASES Page

Faulkner Advertising v. Nissan Motor Corp.,
905 F.2d 769 (4th Cir. 1990), *aff'd. en banc*,
945 F.2d 694 (4th Cir. 1991).....7

Image Technical Service, Inc. v. Eastman Kodak Co.,
903 F.2d 612 (9th Cir. 1990), *cert. granted*,
59 U.S.L.W. 3833 (June 18, 1991).....7

Jefferson Parish Hosp. Dist. No. 2 v. Hyde,
466 U.S.2 (1984).....4, 7

Northern Pac. Ry. Co. v. United States,
356 U.S. 1 (1958).....5

United States v. Loew's, Inc.,
371 U.S. 38 (1962).....7, 8

CONSTITUTION, STATUTES, AND RULES

Clayton Act
Section 3.....5, 6

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY

SUPPLEMENTARY STATEMENT OF THE CASE

The testimony of Young's expert Dr. Rubin (R. 27-529-530) and his report (PX. 125) was substantial evidence that Marquette was dominant in the tying product market and it justified the jury's finding that Marquette "had sufficient power in the relevant market to raise prices or impose burdensome terms to a significant number of buyers within the market" (3a).[1] Marquette Division Manager Mickelson confirmed this by his testimony that Marquette sold "better than 50% of the [EKG] market in most areas of the country" (R. 13-339 at 315, 322-347-351). Marquette attacks the weight[2] of Dr. Rubin's opinion that it "occupies a dominant position in the market for

[1]References to (a) are the appendix to Young's petition for a writ of certiorari. Additions to the appendix which are included with this reply are numbered consecutively following the last numbered page of the appendix to the petition.

[2]Dr. Rubin's qualifications as an expert were stipulated (R. 27-505); his opinion and the U.S. Testing Company Market Research Report (PX. 125)

EKG, Stress testing equipment. . . " (PX. 125 at 13), and ignores its self-description as a "world leader" in electrocardiography (PX. 5, 108 and R. 18 at 52), and ignores its effort made in this case to protect against Young's alleged violation of its tradename and trademark (R. 14-10-16; PX. 110, R. 20-939). Clearly, the Eleventh Circuit did not decide the tying claim on the question of proof of Marquette's dominance in the tying product market (39a).

Appleton Paper Company manufactured the paper stock used by Marquette and Young and it considered the difference between the two papers to be subjective, "minimal" and "very slight." (R. 13-339 at 117, 120-121). Young was able to sell its generic paper to hospital customers at a price 18% less than "Marquette" paper, and nevertheless retain a 10% greater return (R. 18-141-142).

Marquette's service and supply division (including paper) showed a 50% pre tax profit as of August, 1986. Furthermore, its supply sales yielded 15-20% of overall corporate profit although they represented less than 5% of gross corporate sales (R. 20-723-24; R. 22-1333-1336).

Marquette decided to establish its own supply facility in the State of Florida (PX. 102, 103, 104), and in the words of Warren Cozzens, a co-founder and officer of Marquette, his company's supply division had decided to make an effort to "put [Young] out of business." (PX. 93, R. 20-922-929 at 927).

In an effort to implement the corporate strategy of putting Young out of business, and of increasing its sales of its own higher priced paper Marquette pursued the tying strategy in question:

(1) Marquette employees had telephone and face to face

---

were admitted into evidence (R. 27-523-525, 530); and the admission of this evidence and Dr. Rubin's qualification as an expert were not challenged by Marquette on appeal.

contact with all potential customers in the southeast,[3] and falsely advised them that non-Marquette paper would damage printheads, and (2) Marquette would presume such as being the caused of damage to customer's machines and would not render warranty and other contracted for service if the customer continued to use non-Marquette paper (R. 27-399-400; R. 13-339 at 36-38, 68-79, 293, 296, 382.

The Marquette warranty agreement provided to hospital customers stated that:

> This warranty does not cover repairs or replacement parts which ***in the opinion of Marquette***, are required as the result of . . . use of . . . supplies not recommended by Marquette (PX. 36) (emphasis supplied).[4]

Marquette senior management and service personnel knew (R. 13-339 at 174-175; R. 22-1286, 1299; and R. 13-339 at 382), and the district court agreed (22-23a) that Young's generic paper did not, in fact, cause damage to Marquette equipment and the contention that it did was conduct which was a deliberate misrepresentation.

In response to Marquette's statements, Veteran's Administration and other tax-supported hospitals decided to pay extra money to purchase Marquette paper (R. 13-339 at 36-38 and 202).

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[3]The Eleventh Circuit and Marquette have overlooked Taylor's testimony that he had heard the Marquette telemarketers tell customers that their warranty or service contracts would be "no good" if the customer used non-Marquette paper (R. 27-399) (72a). They have also overlooked substantial evidence, other than the disputed hearsay, which the district court concluded was "ample evidence" of Marquette's tortious interference (25a). Consequently, there was non-hearsay proof of Marquette's contact with all potential customers, and "ample" proof of Marquette's tortious interference with Young's business.

[4]Marquette never published specifications for paper it considered satisfactory for use in its machines (R. 18-142; R. 21-1121; R. 22-1299, 1336; R. 13-339 at 536), and never approved the use of any paper other than its own for use in its machines.

I. THE ELEVENTH CIRCUIT'S RESTRICTIVE DEFINITION OF TYING CONFLICTS WITH THE LANGUAGE AND POLICY OF THE ANTITYING STATUTE.

Contrary to Marquette's representation at pages 5-6 of its brief in opposition, the Eleventh Circuit's decision on the tying claim was not based on Young's failure to define a relevant market for the tying product.[5]

Instead, the Eleventh Circuit decided that a tying arrangement exists *only* where, as is frequently the case: (1) the seller literally conditions the "sale" (rather than fixes a price or discount) of the tying product upon the purchase of the tied product; (2) the sale is completed at a discrete point in time and is accompanied contemporaneously by "delivery" of the tying product or service sold and paid for, and (3) the defendant absolutely refuses to deliver the tying product unless the customer continues to purchase the tied product.

The Eleventh Circuit opinion, limiting the concept of "tying" to necessarily include the above requirements, is in error. First, it fails to acknowledge that the actual language of the Clayton Act not only forbids the "sale" or "lease" of a

[5]Marquette states that "the Appellate Court" held Young failed to define a relevant market for the tying product, but it cites the district court's memorandum opinion and ignores the Eleventh Circuit's disclaimer (39a).

The District Court's opinion that proof of a relevant market for the tying product was required to prove Young's *per se* claim was erroneous and was the focus of Young's appeal from the judgment n.o.v. on the tying claim. The district court properly identified the elements of proof of a *per se* tying claim, but, without explanation, reversed the jury's finding of the relevant tying market and concluded that failure to define the relevant market in equipment defeats showing Marquette's power in that market (21-22a). When a seller's market share is high as is Marquette's, or when it offers a unique product that competitors are not able to offer, the likelihood that market power exists and is being used to restrain competition in a separate market is sufficient to make *per se* condemnation appropriate. *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 446 U.S. 2, 19 (1984).

tying product, conditioned on the buyer's also purchasing a "tied" product, the statute alternatively forbids a seller from "fix[ing] a price charged therefor, or discount from, or rebate upon such price" for a tying product conditioned upon the purchase of a tied product. Moreover, the opinion ignores the alternative statutory terms "understanding" and "agreement" contained in Section 3 of the Clayton Act; fails to recognize that a "sale" is not complete until delivery of the product or service sold which frequently will not occur contemporaneously with the negotiation; fails to acknowledge the lack of economic distinction between an absolute and practical withholding of the tying product based upon the creation of substantial price incentives; and fails to reflect Congressional purpose underlying Section 3.

By analogy to *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958), suppose, today Northern Pacific, mindful of Supreme Court precedent, signed a contract to sell mining and timber rights, including necessary rights-of-way to its property, to customers for a specified price. Thereafter, the customers began shipping the minerals and timber by means of a less expensive trucking service rather than Northern Pacific's rail service. In response, Northern Pacific's railroad division advised customers that they would have to pay an additional price for "access" to the property unless they shipped the minerals and timber using Northern Pacific's rail service. The customers thereupon acquiesced to Northern Pacific's demand. In this scenario, no tying arrangement existed initially but rather came into existence upon "delivery" of the tying product. Moreover, Northern Pacific did not absolutely refuse to provide "access" to the property but instead threatened to impose an additional, duplicate charge for the tying product unless the customers purchased the tied product.

Under the rationale of *Northern Pacific*, and Congressional intent surrounding the enactment of Section 3 of the Clayton Act, such a *de facto* economic conditioning is equally prohibited: the defendant has used economic leverage which it posseses with respect to the desired product to practically force customers to purchase a second, less desirable product. The facts that imposi-

tion of the "conditioning" is delayed until delivery of the tying product and that the threatened withholding of the tying product is not absolute, but rather is based upon "fixing a price," do not change the character of the conduct. The economic means, motive, and effect are the same in the two cases. In the hypothetical case, just as in the actual case, customers of the tied product are forced to pay a non-competitive price for a less desirable product, and are practically prevented from purchasing product (services) offered by the defendant's competitors.

Delaying imposition of the tying arrangement until delivery of the tying product, in fact, enhances the defendant's leveraging power. If customers knew in advance, at the time the terms of the sale were negotiated, that Marquette would require them to pay 18% more for paper if they wished to actually receive warranty repair service without an additional, duplicate charge, customers might rationally shop around more for alternative, "off-brand" equipment. But once customers actually pay for the Marquette equipment, receiving also a promise to provide future repair services, they are locked into that choice. Marquette offered no evidence that repair service for its machines was available from any other source or that it competed for business in the repair market.

Moreover, there is no meaningful difference between an absolute withholding of repair service, on one hand, and the refusal to provide that service at the negotiated, and already paid price, or for any reasonable surcharge. In no tying case, after all, would the withholding of the tying product be truly absolute; everything has its price. In theory, purchasers of a desired tying product could purchase the seller outright if the seller withheld the tying product.

To place the analysis within statutory terms, Congress specifically included the terms, "fix a price" or "discount" or "rebate," as alternatives to "sell" or "lease" with respect to the tying product. That alternative element of the offense must be given meaning. In addition, Congress utilized the terms "agreement" and "understanding" as alternatives to

the term "condition," in Section 3 of the Clayton Act, thereby characterizing the "condition" element more flexibly. In other words, Marquette's threat to deliver the tying product (repair services) only on condition that the customer either (a) purchase Marquette's tied product (paper), or (b) pay an additional duplicate, non-competitive price for the tying product constitutes an implied, rather than direct, conditioning, and results in a coerced "agreement" or "understanding" (based upon Marquette's fixing of "variable" prices for the tying product) that the customer will purchase its tied product.

It is beyond serious argument in this case that there is indeed proof of Marquette's coercion and there is substantial evidence of its dominance in the tying product which Marquette did not rebut. Thus, the inquiry is whether the existence of *forcing* is probable, and if it is then ***per se*** condemnation is appropriate without extensive market analysis[6] *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 9, 15 (1984). The Eleventh Circuit's restrictive re-definition of tying is the barrier to a proven ***per se*** violation in this case wherein Marquette submitted no credible evidence of justification that would make its conduct procompetitive.[7]

---

[6]Mark P. Cohen who is counsel for Marquette in this case is counsel of record for the National Office Machine Dealers Association, et al. as Amicus Curiae in *Image Technical Service, Inc. v. Eastman Kodak Co.*, 903 F.2d 612 (4th Cir. 1990), *cert. granted*, 59 U.S.L.W. 3833 (June 18, 1991), argues at pages 16-17 of his brief (filed September 19, 1991) in *Kodak* that the requirement for market analysis in order to survive a summary judgment "is overly burdensome and in direct conflict with this Court's opinion in *United States v. Loew's*, which provided, 'it should seldom be necessary in a tie-in sale case to embark upon a full scale factual inquiry into the scope of the relevant market for the tying product and into the corollary problem of seller's percentage share in the market.'

[7]Tying arrangements such as the one Marquette has enforced are not procompetitive or competitively benign because of the proven harm to the public interest in the cost of health care resulting from foreclosure of competition. Tying, generally, remains a present and important issue, for example see *Faulkner Advertising v. Nissan Motor Corp.*, 905 F.2d 769 (4th Cir. 1990) *aff'd. en banc* 945 F.2d 694 (4th Cir. 1991) which is evidence of the importance of this Court's authoritatively defining a

Marquette's "implied" or "effective" conditioning is unlawful, as in *United States v. Loews, Inc.*, 371 U.S. 38, 45 (1962): "for two reasons — [it] may force buyers into giving up the purchase of substitutes for the tied product . . . and [it] may destroy the free access of competing suppliers of the tied product to the consuming market."

Loew's is evidence that the Court, as well as Congress, is not concerned with form but is concerned with economic reality. Both of the expressed evils of tying arrangements are demonstrated in this case, although the tying understanding is not imposed by Marquette at the time of the original negotiation, and although Marquette's conditional refusal to deliver the tying product (service and the corresponding benefit of the equipment) is not absolute.

The reality of this case is that the public is paying substantially increased prices for electrocardiographic recording paper without any good reason for doing so. Thus, it appears that the Eleventh Circuit's apparent revision of the definition of unlawful tying arrangements will sanction rising health care costs.[8]

"tying arrangement." *Faulkner* affirmed by an evenly divided court the dismissal of a complaint that automobile retailers were directly forced to purchase a tied product (advertising) in order to receive delivery of the tying product (automobiles). The auto dealers complained that they were forced to pay an increased price for automobiles to cover the cost of advertising which they could have purchased separately from another source.

[8]Anticompetitive abuses in the health care industry were said to be an area of priority concern to the United States by James F. Rill, Assistant Attorney General, Antitrust Division, United States Department of Justice in a speech to the Antitrust Committee of the Litigation Section of the American Bar Association, Antitrust Litigator, ABA Section of Litigation, Newsletter No. 15, September, 1991.

II. THERE WAS AMPLE "NON HEARSAY" EVIDENCE TO SUPPORT THE JURY'S VERDICT THAT MARQUETTE TORTIOUSLY INTERFERED WITH YOUNG'S BUSINESS.

Marquette does not account for Taylor's (Marquette's former printing plant supervisor) entire testimony (72-73a), or that of Calenberg a Marquette telemarketer whose testimony was not excluded as hearsay. These two Marquette employees confirmed its strategy regarding Young.

Marquette also fails to acknowledge the district court's opinion on its decision denying a judgment n.o.v. on the tortious interference claim which identified specific additional tortious conduct by Marquette beyond fraudulent representations (25a). The Eleventh Circuit purported to conclude, without accurately describing the "reams of evidence" (51a), that there was insufficient evidence to support a rational jury verdict but it was apparently unable to fully and accurately consider the lengthy record.

This Court should rule that except in the most elementary of cases having uncomplicated records that Federal appellate courts should not exclude from review record evidence without allowing the district court to evaluate the newly reduced record to determine the necessity for a new trial in consideration of the improper admission of evidence. The trial judge's primary role in reviewing the adequeacy of an entire record to support a verdict avoids the perception of a result-oriented bias naturally following an abstract evaluation of less than the entire record.

Marquette is mistaken in its representation of the proceedings on the judgment initially in Young's favor for tortious inference with business. Marquette's alternative motion for a new trial of Young's tortious interference claim was denied (24-28a), and it appealed from the judgment in Young's favor. The Eleventh Circuit's decision granting Marquette a JNOV

on this claim on admissibility of evidence grounds was the first cause for Young to have raised the point that a motion for a judgment n.o.v. tests only the sufficiency of the evidence not its admissibility. Young asked in a supplement to its petition for rehearing on the tortious interference claim that a new trial be ordered on that claim (55a).[9] The Clerk of the Eleventh Circuit accepted Young's supplementary request which the court ultimately denied (ra12).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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---

[9]Marquette has erroneously stated at pages 6 and 8 of its brief in opposition that Young does not challenge the Eleventh Circuit's hearsay rulings. See footnote 8 at page 16 of Young's petition for a writ of certiorari.

APPENDIX

Respondents were asked, "What is your primary brand of EKG equipment?" Table 1 reveals that most respondents either use Marquette (48%) or Hewlett Packard (39%) EKG equipment.

Table 1
Response to Question #1
"What is your primary brand of EKG equipment?"

Brand	Frequency	Frequency %
Marquette	125	48%
Hewlett Packard	100	39%
Burdick	18	7%
Cambridge	8	3%
Others	7	3%
None	1	.3%
	259	100%

Table 1a takes into consideration the category "Undercount." It indicates that the Marquette category decreased by 1 percent from the original data tabulation. This indicates that the distribution is not appreciably affected by the undercount.

Table 1a

Response to Question #1 with Undercount Category
"What is your primary brand of EKG equipment?"

Brand	Frequency	Frequency %
Marquette	125	47%
Hewlett Packard	100	37%
Burdick	18	7%
Cambridge	8	3%
Others	7	3%
None	1	.3%
Undercount	9	3%
	268	100%

Question 2

Question 2 asked resondents, "What is your primary brand of stress testing equipment?" Table 2 reveals that Marquette has the largest share of the market with 43%. Quinton has the second largest share with a distant 27% of the market.

Table 2

Response to Question #2

"What is your primary brand of stress testing equipment?"

Brand	Frequency	Frequency %
Marquette	111	43%
Quinton	69	27%
Hewlett Packard	90	3%
Burdick	7	3%
Cambridge	5	2%
IMC Seamans	4	1%
Copy Stress	4	1%
None/Dk	39	15%
Others	11	4%
	259	100%

Table 2a takes into consideration the category "Undercount." It indicates that the Marquette category decreased by 2 percent from the original data tabulation. This indicates that the distribution is not appreciably affected by the undercount.

Table 2a

Response to Question #2 with Undercount Category
"What is your primary brand of stress testing equipment?"

Brand	Frequency	Frequency %
Marquette	111	41%
Quinton	69	26%
Hewlett Packard	9	3%
Burdick	7	3%
Cambridge	5	2%
IMC Seamans	4	1%
Copy Stress	4	1%
None/Dk	39	15%
Others	11	4%
Undercount	9	3%
	268	100%

Question 1 and Question 2 Combined

Table 4 indicates that 63% of the respondents have some form of Marquette equipment. That is, 31% have only Marquette EKG equipment, 23% have only Marquette stress testing equipment, and 46% have both EKG and stress testing equipment manufactured by Marquette. Whereas 42% of the respondents have some form of Hewlett Packard equipment.

Table 4

Question #1 and #2 Combined

EKG Equipment	Freq	%	EKG Only Freq	%	Stress Test Only Freq	%	Both Freq	%
Analyzed Responses	259							
Marquette	162	63%	51	31%	37	23%	74	46%
Hewlett Packard	105	42%	96	91%	5	5%	4	4%
Burdick	24	9%	17	71%	6	25%	1	4%
Cambridge	12	5%	7	58%	4	33%	1	8%

These numbers and percentages reflect multiple responses.

DAVID TAYLOR TESTIMONY
(R.27-398-400)

*****

Q Would you tell us what you did with Terry Johnson doing your work?

A When Terry Johnson came in, he came from the outside and he confided in me. I was one of the few people that he confided in. I think still today he doesn't have anybody that he confides in, but he confided in me. He thought I was his best friend, I would say.

Q Did you work with Terry at the end of 1986?

A Right, directly I was with Terry. I worked under Terry for the last year.

Q And, did you work with Terry in 1987 before you left?

A Right.

Q Did you have any discussions with Terry about a man named Harris Young or a company named T. Harris Young and Associates?

A Yes, we had a lot of conversations.

Q Would you please tell me about those conversations?

A Well, everything that he confided in me about the relationship, he brought in four telemarketers. We never had telemarketers. Terry Johnson brought in four telemarketers and we just took sales direct for all the years that I was there. And, the four telemarketers started working the country and he worked the south, they worked the southeast here real hard against Harris to try to take over the southeast. And, with that, they were doing their sales pitch of the telemarketers which was putting on if you continued to buy Harris Young's paper, your warranty would be no good and also your service contract would be no good.

Q Did you have any discussion with Terry Johnson about that?

A He confided in me. He told me all about it and I stood out there and listened to the telemarketers.

Q What did you listen to and what did you hear?

A Tim, that was the head telemarketer, in the first three months that he put the telemarketers on, we had a million dollar party. The telemarketers sold one million dollars in the first three months that they had put those on.

Q Did Terry Johnson tell you that he instructed the telemarketers about anything, about to say anything in particular about Mr. Young or his company?

A Well, just if you used other paper than Marquette's paper, that your service contract was no good and also your warranty on your machines.

Q Did you have any discussions with Terry where Harris Young or his company was specifically mentioned by Terry?

A Yes, we talked about it. It was a big laughing joke at the time. They pulled in one million dollars in three months so it was a —

Q All right; and, for how long did this go on?

A Until I left, it was still going on. I left in 1987, July 1 of 1987. It was still going on when I left.

CHARLES BRINKLEY TESTIMONY
(R.13-339-36-38)
******

Q. Have you, during 1988, had the experience of having Marquette representatives visit your facility, your hospital facility or your department facility?

A. During '88?

Q. Yes.

A. Yes.

Q Have you had the occasion personally to speak with any representatives of Marquette while they were at the hospital facility?

A. Yes.

Q. And during those occasions have you had the experience of having Marquette representatives make statements to you concerning what kind of recording paper that should be used in the Marquette equipment?

A. I think most of tihs went on before 1988, and actually, its been sort of an ongoing thing from the time that I was at Marquette and my conversations that I've had with my supervisor and so forth, and conversations that he's had with people at Marquette.

Q. Would you start with your experience at Marquette and then take us forward and relate for me, please, what experience you had in conversations with Marquette folks about recording paper.

A. There were questions, you know — like you said, there were several people there from different hospitals being trained, and there were questions about using different type paper in the Marquette recorders. And we were told that, you know, it might be possible to use a lot of different types of paper in it and that they might be okay, but that they had had ex-

perience with some types of papers that had too rough a surface and which did cause scratches on the print head which caused early failure of the print head, and that if that happened, that they wouldn't be covered under a service warranty or I believe under a service agreement. I really wasn't too interested in the service agreement because we don't have one or probably won't. But I'm sure they said that it wouldn't be covered under warranty if it was found that a paper had been used which was not suitable for the thermal print head and that it had been damaged because of the paper we used.

Q. Let's stop for a minute and permit me to interrupt by asking a question concerning statements of that regard made at the training session. Was Graphics Control paper specifically identified in that session as one that had been found unsuitable?

A. I don't believe so. They may have mentioned a specific type paper, but I don't remember if they did.

Q. Pardon the interruption. If you would then continue and tell me when is the next time that you had the occasion to have a statement made in your presence or to your supervisor that you know of concerning this subject.

A. Well, we had just discussed it, and I didn't know we would be doing all this so I wasn't keeping notes or keeping dates or anything. But I know he had talked with some of the folks at Marquette and had gotten the same impression that I had, that there might be some problem with warranty if a paper was used that was found to be damaging the heads, and we discussed it, and we came to the conclusion that it would just be better for us to use Marquette paper during the warranty period so there wouldn't be a problem with that, and then when the warranty period was over, we could try other papers and see if they seemed to work okay if there were other papers available that were cheaper than the Marquette paper.

Q. Is the cost of health care delivery a concern to your hospital?

A. Sure.

Q. Why?

A. Because, you know, it's a big problem trying to keep costs down. We always try to operate as economically as possible for that reason.

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